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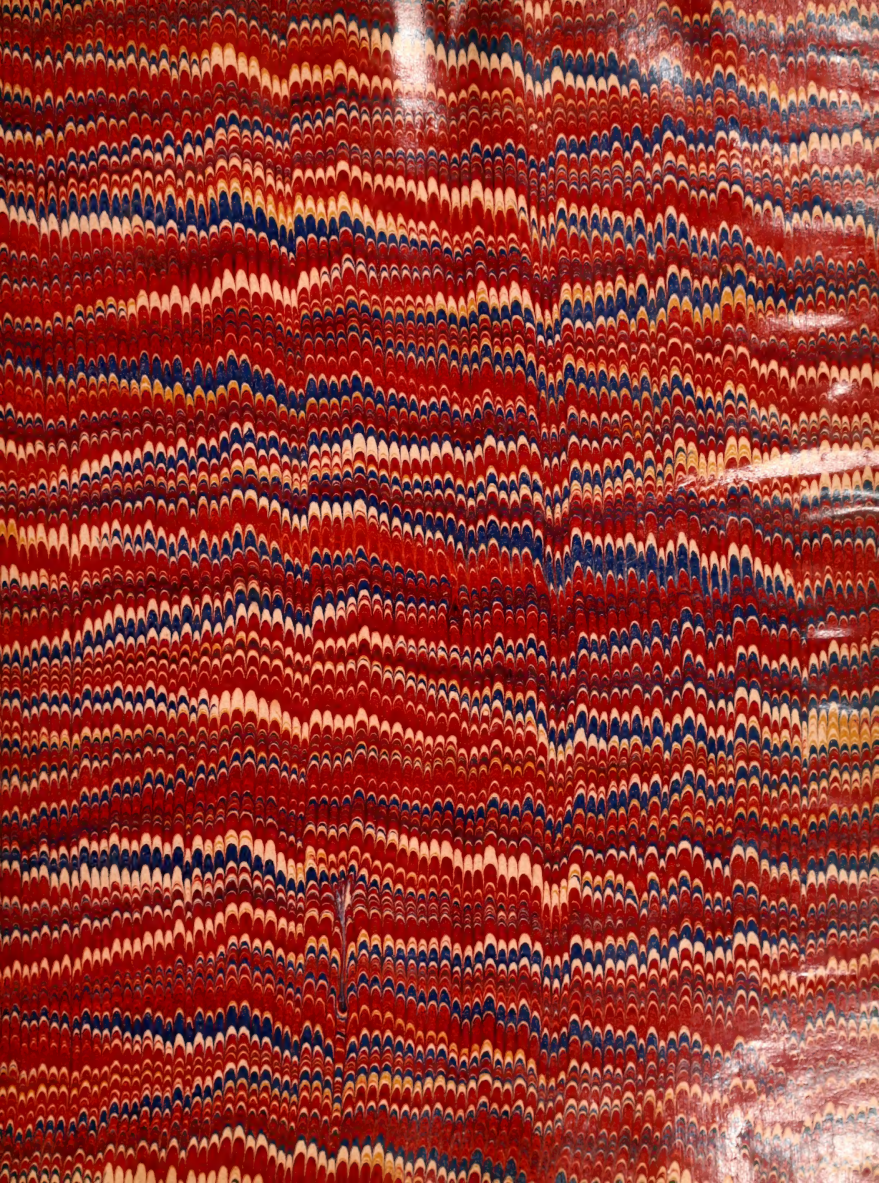
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THE DEVELOPMENT  
OF THE  
ENGLISH LAW OF CONSPIRACY

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## PREFACE

The following pages contain the result of an investigation into the English law relating to criminal conspiracy, begun in the spring of 1905, and continued with little interruption until May, 1908. The author's purpose has been to present an exhaustive description of the subject based upon an examination of all the available material extant. Accordingly, he has considered every relevant statute and case, from the earliest to the latest, which upon a careful search through all the ancient and modern law-writers he has been able to bring to light.

There is scarcely a more complex topic in the entire domain of British national jurisprudence than that of illegal combinations. The law relating to them has been more than ordinarily the creature of accident and special conditions. The resultant contradiction and confusion introduced into the cases renders extremely difficult the task of extracting the underlying principles, tracing their rise and growth, and giving an intelligible account of the causes which have determined their subsequent history.



The author desires to acknowledge his indebtedness to Professor Willows for the facilities which have been made possible, as well as for his careful correction and ever-ready friendly interest.





## CHAPTER I

### ORIGIN AND EARLY HISTORY OF THE LAW OF CONSPIRACY TO THE END OF THE REIGN OF KING EDWARD I

Our first definite and reliable information regarding the conception of conspiracy in English law is found in several ordinances and statutes passed during the reign of King Edward I. This fact has accordingly led some authorities, notably Mr. Justice Wright, to believe that the crime of conspiracy was created by these enactments. Others are equally emphatic in claiming for the offense a common law origin antedating the statutes, an <sup>a</sup>scope extending far beyond the limits marked out by them. It will be our duty, therefore, to examine the grounds of this conflict of opinion and endeavor to find out the real truth of the matter. This we shall do by setting out what is known of the law of conspiracy before the passage of the Edwardian statutes, and then discussing the effects which these acts appear to have really produced.

The statutes bear internal evidence that they are intended to deal with an offense not entirely unknown to the law. Not until the third statute is the attempt made to define conspiracy. The first "Ordinance of Conspirators," anno 21 Ed. 1, provides a remedy against "Conspirators, inventors and maintainers of false quarrels and their abettors and supporters and



and having part therein, and brokers of debate." The "Anglo-Saxon  
super Charles", 33 Ed. 1, Stat. 3, Ch. 16, is no more explicit  
in its mention of "conspirators, false informers, and evil pro-  
curers of dozens, assizes, inquests and juries." It is obvious  
that the execution of these acts with justice and uniformity  
would have been impossible in the absence of an already exist-  
ing body of custom supplying a more or less accurate descrip-  
tion of the offense denounced. An even clearer reference to  
extra-statutory legal principles relating to conspiracy seems  
to be embodied in a clause in the famous "Definition of Conspir-  
ators," 33 Ed. 1 (1104) directing "that justices assigned to  
the hearing and determination of felonies and trespasses should  
have the transcript hereof." Since, as we shall see, the two  
former statutes had provided only civil remedies against con-  
spirators, the criminal liability evidenced by the Definition  
being supplied to the criminal justices could have arisen only  
from the common law. (1)

The inference that the law had begun at a very early per-  
iod to take cognizance of the special dangers to be apprehended  
from concerted evil doing is supported by positive testimony.  
Thus, we find that plotting against the life of the King or of  
a lord was punished by the Anglo-Saxon laws. (a) Passing to a  
later period, we are shown in the record of the Shropshire Eyre  
for the year 1221 a case strikingly similar to a modern boy-  
cott. (b) The word "conspirator" is first met with in the

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(a) Laws of King Alfred, Ch. 4; Laws of King Aethelstan, Ch. 4  
(b) Select pleas of the Crown (Selden Soc.)



Mirror of Justices, (a) written between the years 1350 and 1390. In the chapter entitled "The View of Frankpledge," hundredors are directed to assemble once a year all the men of their hundreds in order to inquire of the various "Tines against the holy pease"; among them, " of conspirators and all other articles which may avail for the destruction of all." Britton (b) includes in his discussion of pleas of the crown a chapter upon certain conspiracies or "alliances" to the hindrance of justice; and Bracton (c) makes mention of the offense of "conspiracy" by name.

These passages, all of which antedate the passage of the first Ordinance of Conspirators in 1294, clearly evidence a conception of conspiracy which had attained to some growth in the virgin soil of the common law quite independent of the Edwardian Statutes. (d)

While claiming for conspiracy an origin in extra-statutory law, however, we must be careful to avoid the common error (e) of holding that the ancient law had developed a conception of the offense in any degree as advanced as that which we have today. The modern law upon the subject is the result of a painful course of evolution lasting many centuries. It has been

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(a) Mirror of Justices (Selden Soc. Pub.) ch. 17.

(b) Britton, (Nichols Ed.) p. 19.

(c) De Legibus et Consuetudinibus Angliae (Twiss Ed.) vol. II, p. 335.

(d) Noteworthy, also, is the absence of any but a single statement (See argument of counsel in Y. B. 3 Ed. 2, p. 31.) in the ancient writings that conspiracy originated in these statutes. On the other hand, references by counsel, court, and commentator to the common law origin of the offense, in the later Year Books and in the later authorities, are found in abundance.

(e) Strikingly exemplified in State vs. Buchanan, 5 N. H. 317, the leading American case upon conspiracy.





gradually worked out by the interaction of statutory enactment with judicial elaboration, guided by the circumstances of its history. In order to tell the story of its evolution, therefore, we must examine the condition of the law relating to unlawful combinations as it stood just before the passage of the statutes.

At this period the law had already assumed the aspect which it was to exhibit for some time afterward. "Conspiracy" was limited to combinations whose object was to hinder or pervert the administration of justice. Explicit information upon this subject is derived from Britton. (a) In the passage previously referred to, he says: "Let it be also inquired concerning confederacies between the jurors or any of our officers or between one neighbor and another, to the hinderance of justice, and what persons of the county procure themselves to be put upon inquests and juries and who are ready to perjure themselves for hire or through fear of any one; and let such persons be ransomed at our pleasure, and their oath never after admissible." It is an offense of the same narrow scope which is pictured in the statutes of Edward and in the great majority of the early cases in the year books. (2)

It is not probable that the courts of the period under examination ever took cognizance of conspiracies to commit the more serious crimes, such as murder, robbery, arson, and other felonies. During the reigns between the Norman Conquest and the accession of Edward I, crime was exceedingly rife. Civil war was common. The country swarmed with outlaws, who rendered life and property insecure and traveling hazardous. The civil

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(a) Op. cit. bk.1, ch. 22.



authorities, consequently, had to put forth their utmost exertions to punish the actual perpetration of such outrages. Under such conditions the idea of punishing mere agreements to commit crimes would scarcely arise. Such a thing would not be attempted until the supremacy of the law had become so firmly established that the punishment of actual wrong-doing was regular and certain, and opportunity left for positive attempts at prevention. Not until the crime had been committed would the law be invoked; and then the malefactor would be subjected to the penalty prescribed for his misdeed, with little attention to any conspiracy or other thing preceding, except possibly in so far as it might constitute matter of aggravation. As for combinations to defraud, we must recollect that at the time of King Henry III there was no legal remedy for cheating and deception.<sup>(a)</sup> In the early stages of the law, it is not to be supposed that the confederacy to perform an act not itself judicially cognizable would be considered a crime. Hence we have every reason to suppose that conspiracy in pre-Edwardian times included no more than that is mentioned in Britton and exemplified in the Year Books - combinations to defeat justice.

There is no reference in the books which antedate the first Ordinance of Conspirators to any but the original aspect of conspiracy. Whether the law provided a civil remedy for the offense cannot be known with certainty. It seems clear that the royal courts had developed no such remedy before the Statutes. Neither Glanville, Bracton, Britton, nor Fleta refers to it, though they all treat exclusively and exhaustively of the law administered in

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(a) Pollock and Maitland, "History of English Law," vol. 2, p. 388.





in these tribunals. Moreover, the writ habeas corpus is granted by the Ordinance concludes with the phrase "habeas corpus statu-  
uti". It is quite possible, however, that civil actions were entertained in the county, hundred, and feudal courts for the redress of wrongs originating in unlawful combinations; if not generally, yet under certain conditions or in certain localities. But no positive proof upon this point can be adduced. Since none of the local tribunals were "courts of record", we have very little information in regard to the various customs recognized and enforced by them. Indeed, the older law so confused civil and criminal procedure that in speaking of a civil action of conspiracy at the period under discussion we may be guilty of an anachronism.

Modern law treats as a crime the mere combination to do certain acts. The offense is complete as soon as the agreement is formed, and is wholly distinct from any act performed in pursuance of it. The ancient law was otherwise. The conspiracy was an element to be taken into account, but was not in itself a complete crime. For this statement we have the authority of Bracton. Writing of principal and accessory in criminal prosecutions, he states that the accessory may not be put to answer until the principal has been tried: "because," he adds, "where there is a principal party, there may sometimes be an accessory, but never an accessory where there is no principal party, because where a principal act has no existence, there is consequent on it can have no plow, or cart, or rail of precept, conspiracy, and such like, because these things may



occur even without any act, and are sometimes punished if an act is subsequent, but without any act not so, like the saying; 'For what harm did the attempt cause, since the injury took no effect?' Nor ought precept, conspiracy, precept and counsel to do harm, unless some act follows." Traces of this principle linger long after the reign of Edward I. In the 42nd year of King Edward III (A.D. 1368), <sup>(a)</sup> we find a case arising upon a writ of conspiracy in which the argument is made by counsel and assented to by the court that a mere "parlance" of conspiracy without an act in execution of it is not an indictable offense. And the preamble to the Statute 3 Henry 7, c. 14 (A.D. 1486), declaring conspiracies to destroy the King or his great officers to be felonies, recites that such conspiracies are frequent, and that "by the law of this land, if actual deeds be not had there is no remedy for such false compassings, imaginations, and confederacies against any lord, etc., and so great inconveniences might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done". At the time of this statute, and even of the case cited, the tendency to hold the combination punishable apart from the act performed by it was becoming noticeable. The citations given, however, sufficiently evidence the older rule that the bare conspiracy was not subject to animadversion of the courts. <sup>(3)</sup>

The above pages present a complete inventory of such information regarding the ancient common law conception of conspiracy as can be gleaned from the scanty evidence that has

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(a) Year Book, 12 Ed. 3, fol. 11.



come down to us. We must now take up and explain the contents and effect of the Statute of Conspiracy.

The first of these, passed in the first year of Edward I (A.D. 1293),<sup>(a)</sup> is usually known of as the "Ordinance of Conspirators". Its provisions are as follows: "As to those who may desire to complain of conspirators, procurers of pleas maliciously to be moved in the country, as well as of brokers who maliciously maintain and sustain such pleas and contumelies that they may thence have part of the land or any other benefit, let them come before the justices assigned to the pleas of our Lord the King and there let them find security for prosecution their plaint. And let the Sheriff be commanded by the writ of the Chief Justice and under his seal that they (i.e. the defendants) be before the King at a certain day: and there let swift justice be done. And let those who shall be convicted of this be severely punished according to the discretion of the Justices aforesaid, by imprisonment and ransom: or let such plaintiffs, if they so desire, await the iter of the justices in their neighborhood, and there let them pursue their remedy."

This ordinance appears among the statutes of uncertain date in a slightly altered form: <sup>(4)</sup> "Our Lord the King at the information of Gilbert de Roubery, clerk of his council, hath commanded that whoever will complain of conspirators, inventors, and maintainers of false quarrels, and their abettors and supporters and having part therein, and brokers of debates, that persons so grieved and complaining shall come to the chief justices of our Lord the King, and shall have a writ of them, under their seals, to attach such offenders to answer to parties grieved so complaining before the aforesaid justices, and shall





shall be the writ made for them: (Here follows the writ. See post.) And if any be thereof convicted at the suit of such complainants, he shall be imprisoned 'till he hath made satisfaction to the party grieved, and he shall also pay a grievous fine to the King." An incorrect and incomplete version of the same ordinance is also appended to the Statute of Chancery, (a) and wrongly attributed to the 33rd year of Edward I.

Whether the last two of these instruments are but inexact transcripts of the first, or whether they re-enacted it with the addition of a specific writ, the purpose of the group was to provide a civil action in the royal courts for damages caused by the acts of unlawful combinations of malefactors. No especial significance is to be attached to the provisions for fine and imprisonment to be inflicted upon those found guilty of conspiracy in these proceedings. Such penalties were commonly inflicted upon unsuccessful parties to a civil action, and only bear testimony to the indistinctness of the line drawn between civil and criminal procedure in early English law.

The next statute that deals with conspiracy is the "Articuli Super Chartas," anno 28 Ed.; Stat. 3, ch. 10 (A.D. 1300) (b) It provides as follows: "In regard to conspirators, false informers, and evil procurers of dozens, assises, inquests, and juries, the King hath ordained remedy for the plaintiffs by a writ out of the chancery. And notwithstanding, he willeth that his justices of the one bench and of the other, and justices assigned to take assises, when they come into the county

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(a) Stat. 35 Ed. 3, Stat. 3 (A.D. 1308); 1st St. at Large, p. 150  
(b) 1 Statutes at Large (Templars) p. 238.



to do their office, shall, upon every complaint made unto them, award remedies thereon without writ, and shall be right unto the plaintiffs without delay." This act is evidently intended to improve the remedy previously established by permission actions or conspiracy to harm without writs. What its effect was cannot be known with certainty. One or two allusions in the earlier Year Books would indicate some doubt in the minds of the judges lest the action by writ or conspiracy was intended to be entirely superseded by the new remedy. This doubt, however, seems to have been resolved in favor of the older action. All the cases in the Year Books (except a few criminal prosecutions) were begun by writs; and there is nothing to show that the new procedure was ever followed at all. (5)

We come now to the statute which for the first time tells us something regarding the exact nature of the offense of conspiracy. This is the famous "definition of Conspirators, made anno 13 Edward I, Stat. 2, and A.D. 1304,"<sup>(a)</sup> which served as the very basis of the law for a long time after its passage. It states "who be conspirators" in these words; "Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously to indite, or cause to be indited, or falsely to acquit people, or falsely to move or maintain pleas; and also such as cause colldred within are to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the county with liveries or fees for to maintain their malicious enterprises and to suppress the truth; and

(a) 1 St. at L., p. 232 (Folios 21.); 1 St. at L., (Harrington



this extendeth as well to the takers as to the rivers, and stewards and bailiffs of great lords, which by their seignory, office, or power, undertake to hear or maintain quarrels, pleas, or debates for other matters than such as touch the estate of their lords or themselves. This ordinance and final definition of conspirators was made and accorded by the King and his council in his Parliament the 33rd year of his reign. And it was further ordained that justices assigned to the hearing and determination of felonies and trespasses should have the transcript hereof."

There are a few other early statutes relating to conspiracy. These, however, are of but little importance for our present purpose, (6)

The real purpose and effect of the Edwardian Statutes may be briefly summarized as follows:- Although the civil action of conspiracy in the royal courts provided by the Ordinance of 11 Ed. 1, and the "Articuli super Chartas" was probably an innovation, the Definition of Conspirators was in the nature of codification of existing law. The conception of conspiracy which appears in the Definition, and the later statutes which slightly extend and improve it, is but little in advance of that attained by Bracton and Britton. And we may be permitted to believe that these Ordinances were intended to set out the entire law of conspiracy as it was then understood. In other words, the essential purpose of the Edwardian Statutes was to render clear and certain the already existing principles of the common law relating to unlawful combinations, and to create and improve the judicial machinery through which

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that law was to be administered. (8)

It is difficult to say just what was the ultimate effect of these statutes upon the development of the conception of conspiracy. They were doubtless both a help and a hindrance. At the time of their passage the law of conspiracy was in a formative stage. The conception of the offense had not as yet been logically and completely worked out by the legal thought of the age. Hence, statutory expression may have been prematurely given to it, and so clothed it with a finality and a rigidity which prevented its gradual improvement by the slow and silent processes of the common law. (9) This consideration may account for the small progress made by the law of conspiracy during the next two-hundred years, until new impetus was given to it by the decisions of the Court of Star Chamber. Still, it is probable that the total effect of the statutes upon the law was, upon the whole, favorable to its growth. They assigned it a definite place in the national jurisprudence, provided suitable procedure for the trial and punishment of conspirators, and prescribed adequate penalties for the improvement of the law. Many cases were consequently drawn into the royal courts, whose decisions soon revealed the defects in the old conception of conspiracy and called attention to the possibilities of its future development. In this way the statutes so greatly advanced the progress of the law toward its modern form that they may be justly said to be the most important factor in the early history of conspiracy, though not the original source from which it arose.



## CHAPTER II

### THE GROWTH AND DECADE OF THE CIVIL ACTION OF CONSPIRACY

The statutes of Edward authorizing the royal courts to entertain civil actions for the redress of certain injuries inflicted by combinations of persons served as a foundation upon which the courts reared a complex structure of unwritten law relating to conspiracy. Limitations as to space forbid an enumeration of the steps whereby the old "strict" or "forced" action of conspiracy was evolved. The process was almost completed by the time of King Henry VII (A.D. 1483.) It will be necessary, however, to examine the matured form of the strict action as it appeared at this period, in order that its inherent limitations and defects may be pointed out, and the way opened for an intelligible account of the progress and causes of its decline and practical disappearance. (1)

The action by writ of conspiracy could be brought by a person who had been acquitted upon a false indictment preferred by two or more persons acting in concert. It also lay for a false appeal in which the plaintiff had been non-suit. Nothing else than a technical acquittal by verdict would support the action. If the plaintiff had gone free by reason of a defective



indictment, a charter of pardon, or benefit of clergy, or had no standing in court. Even if an appeal had been made while the indictment was pending, and upon this appeal the accused was acquitted, wherefore the indictment also failed, he was not entitled to his writ of conspiracy, because he had not been technically acquitted upon the indictment. In like manner, if a person had been falsely indicted as an accessory to a crime, the acquittal of his principal gave him (the accessory) a right of action against the accusers; not so if the principal had died before the rendition of a verdict, or had escaped in any of the ways mentioned above. The writ of conspiracy could not be brought jointly by husband and wife, nor by two or more persons indicted upon a joint indictment, because the grievance was said to be several in all cases.

The writ of conspiracy lay only against two or more defendants. Hence, if all the defendants but one were found guiltyless he was necessarily discharged also. If, however, one of two defendants had been discharged by "matter in law" (i.e. in any other way than by acquittal by verdict), or had died during the pendency of the action, the plaintiff might still proceed to a judgment against the other. Husband and wife, also, were held to constitute but one person in the eye of the law, and were therefore incapable of conspiring with one another.

Certain classes of persons were immune from actions of conspiracy. The most important of these were the members of the presenting jury, or "indictors", who had found the indictment upon which the accused had been presented. Their protection was absolute, even if they had procured themselves to be placed upon the inquest for the sole purpose of indicting the plaintiff. In one case, this protection was allowed, by analogy,



to the extenders in an elegit who had conspired to deprive a person of his land by means of a false extension. A malitied immunity could be claimed by witnesses and other informers connected with the unsuccessful prosecution. So long as these had acted under compulsion of the law and in good faith, they were protected from suit; not so if they could be shown to have been guilty of any collateral corruption, malice or covin. Commissioned judges, justices of the peace, bailiffs, and other court officers who had assisted in the prosecution of the accused occupied a very similar position. If they had acted in pursuance of their duties and within the scope of their offices, they were exempt from suit; but if they had gone outside of their duties, they might be held liable. In the same way, it appears that a "man of the law" could not be charged with conspiracy by reason of advice rendered a client and leading to an indictment or an appeal, provided he had acted in good faith and in the course of his professional duty.

An action of conspiracy lay upon an acquittal by verdict of a charge of felony or of treason. This is the principle finally settled upon by the authorities. We find in the Year Books during the reign of King Edward III, however, several cases in which writs of conspiracy were grounded upon injuries not covered by the above principle, or even by the Definition of Conspirators.<sup>(2)</sup> These exceptional cases may be attributed to the vague form of the writ of conspiracy prescribed in the Ordinance of Conspirators,<sup>(3)</sup> which afforded opportunities for such judicial discretion as to entertaining the action in new cases. In course of time, the writ became more explicit in





describing the conspiracy complained of. Several definite formulas applicable to the various circumstances under which false accusations of treason and felony might be prosecuted in vain came into existence.<sup>(4)</sup> Finally, these forms became the only legal forms, and unless the complainant's case could be brought within the words of these standard writs, he was obliged to seek another remedy, or failing in this, to go without legal redress altogether.

Such were <sup>the</sup> principles governing the strict action of conspiracy. One can easily foresee the defects soon revealed in practice. This ancient remedy fell short of the necessities of the conditions under which it originated. There were many injuries of the same general character with those just enumerated which the action of conspiracy was incapable of reaching. False indictments might be preferred by a single individual. The offense charged might be a crime other than treason or felony. Other perversions of justice beside false accusations might be wrought, by single persons or by combinations of persons. False accusations might fail in other ways than by the acquittal of the accused. All of these wrongful acts were beyond the purview of the writ of conspiracy, but that they should go unpunished was intolerable. On the other hand, false indictments might be preferred by a combination of persons acting in good faith. If such persons were to be liable in damages whenever the accused happened to escape conviction, manifest injustice would be done. So extended a liability to actions of conspiracy would also deter people from laying charges against evil-doers, and would thus operate as a serious hindrance to the administration of



criminal justice. (a)

These defects were eliminated by a process of judicial legislation operating under the cover of a supplementary form of action, which grew up beside the action of conspiracy and enabled the courts to take cognizance of wrongs of the same general nature with those redressed by the older remedy, but excluded from its field by some technical barrier. The result was the complete displacement of the old remedy by the new, which, being based upon an ultimately sound conception, has survived to the present day under the name of "malicious prosecution." The story of this phase of the law of conspiracy is interesting in the extreme, and vividly pictures the mode in which the English Common Law has grown to be what it is today. We shall accordingly describe the changes effected by the new remedy in the civil law of conspiracy, and then explain the causes which brought them about, and finally led to the extinction of the old strict action of conspiracy.

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(a) This was a particularly serious objection in the England of that period, because the prosecution of criminals depended almost entirely upon the zeal of private individuals. Any undue deterrent upon private initiative in this direction would almost certainly result in a large increase of lawlessness.



The new remedy was an action upon the case "in the nature of a conspiracy." (5) It was first (6) brought into the field before occupied solely by the action of conspiracy by the Statute 8 Henry 6, cap. 10 (A.D. 1429.) This act provided that any person falsely indicted or appealed in a jurisdiction in which he does not reside shall, after acquitted or verdict, "have a writ and action upon his case against every procurer of such indictments or appeals," and recover double damages. This statute was held (H.B. 11 Henry 7, f. 23) to have provided a remedy broader than the strict action of conspiracy: whereas the latter lay only after a false indictment for felony, and only against two or more defendants, the former lay for false indictment for a mere trespass, and against a single defendant. The obvious advantages of the action begun by a writ "framed as the matter required", and "tied down to no strict form" soon caused it to encroach deeply upon the province of the strict action of conspiracy, where indeed it almost immediately displaced the older remedy altogether. There are no cases later than the reign of James I (A.D. 1603-1624) begun by a strict writ of conspiracy. The discussions so often met with from the time of James I until the reign of Queen Anne regarding the nature of the action of conspiracy were designed to mark out the limits of the ancient remedy, and to show that the new principles being introduced in connection with actions upon the case in the nature of a conspiracy were not inconsistent with the old, because applicable to an entirely different sphere. (7)



The improvements effected in the law of slander of the new action upon the case were gradually wrought out in a line of judicial decisions extending from the reign of Henry VII to that of King George I (A.D. 1714-1726). The practical completion of the process was shown in the great cases of Savile vs. Roberts, (10 W.3 - A.D. 1698) and Jones vs. Gwynn, (12 A.D. 1715), to be discussed presently. Its results may be briefly stated in the form of the new principles established by it.

(1) A single person who preferred a false and malicious indictment was subjected to a liability to the party injured similar to that previously enforced in an action of conspiracy against a combination of persons who had been guilty of the same act. In the words of Lord Holt, <sup>(a)</sup> "Wherever an action of conspiracy is maintainable against two, there if it be a malicious prosecution by one, case will lie."<sup>(b)</sup>

(2) Actions upon the case were entertained in favor of persons injured by false and malicious accusations of offenses amounting only to trespasses.<sup>(9)</sup> Recovery in like manner allowed for the damages inflicted by false and malicious proceedings in the civil<sup>(10)</sup> and in the ecclesiastical<sup>(11)</sup> courts. It became finally settled, also, that an action upon the case would lie for false and malicious accusations of treason,<sup>(12)</sup> in regard to which the courts for a time had exhibited some uncertainty.

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(a) Savile vs. Roberts, 12 Mod. 208.





(3) The former technical principle requiring the plaintiff in an action of conspiracy to prove a legal acquittal by verdict of the false charge, was gradually relaxed. It became gradually settled that an action upon the case would lie where the grand jury had refused to find an indictment, but had returned an ignoramus upon the bill preferred. (13) Upon a parity of reasoning, actions came to be entertained where the plaintiff had escaped the prosecution by reason of a technical defect in the indictment found. (14) Later, also, suits were allowed even for damages inflicted by false and malicious proceedings, civil and criminal, before a tribunal which was without jurisdiction in the premises. (15)

(4) Although the framers of the Statutes of Conspiracy had sought to provide remedies only for false and malicious accusations, the courts of the time of Edward III, in their zeal to break up conspiracies, were inclined to punish all false accusations whatever. (a) The evil effects of this policy have been already shown. They were corrected by the later doctrine of "probable cause", which has survived in full force until the present day. According to this doctrine, the defendant in an action upon the case for malicious prosecution will escape liability for the false arrest and prosecution if he can prove that the circumstances under which he ordered the plaintiff's arrest had been such as to justify men of ordinary prudence and judgment in believing that the plaintiff was guilty of the crime charged. (16)

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(a) 2 Pollock and Maitland "History of English Law", p. 568.



Thus was the law extended to cases which the strict notion of conspiracy had been unable to reach. We must now endeavor to explain the causes of the process of growth just described, and to show why the action upon the case displaced the old action by strict writ of conspiracy.

None of the defects in the older remedy were such as would necessarily prove fatal to it. Their presence alone does not suffice to explain the displacement of the old remedy by the new. These defects might well have been corrected within the limits of the action of conspiracy, or the two forms might have continued to exist side by side and remained mutually exclusive. But the old form of action embodied a fundamental error. This error lay in the idea that the element of combination among several persons to inflict harm upon another might in itself furnish an universally valid foundation for a civil action for the recovery of damages. (17)

The fallacy involved in making a conspiracy the gist of a civil action is manifest. The immediate purpose of such action is to reimburse the plaintiff<sup>a</sup> for some material loss resulting from the infliction upon him of a legal injury. The amount recoverable is the estimated pecuniary measure of the loss, and in some cases an additional sum by way of "punitive damages." In every instance, however, the plaintiff must have suffered actual damage from the very acts constituting the legal wrong. Now obviously a bare agreement among two or more persons to harm a third person inflicts no material hurt upon him. However malevolent the combination may be, the person against whom it is directed suffers no loss until the acts planned are actually performed. Hence the acts done and not the conspiracy to



do them should be regarded as the gist of the proceeding to make good the damage. Attention should be paid primarily to the damnum; injuria, though essential to recovery, occupied a position of secondary importance as regards the procedure by which such recovery is to be had.

The form of action upon the case enabled the courts to accomplish this shift of emphasis from the conspiracy to the acts done. Its convenience and consequent popularity also led to the substitution of malice for conspiracy as the element of injuria in torts founded upon false prosecutions. The relation existing between conspiracy and malice in this connection is curious and instructive. The vitality of the strict action of conspiracy lay in the fact that it was devised to remedy a class of malicious injuries. The malice of the conspirators was what attracted the attention of the early lawyers, <sup>(18)</sup> and supplied the moral support of the action. But noting that false and malicious indictments and appeals were always preferred by several persons acting in concert, those jurists were led to found the tortious character of such enterprises upon what is little more than a single evidence of malice, instead of upon malice itself. The remedy constructed under these circumstances worked very well as long as malicious prosecutions retained their original incidents. But as litigation increased, malice exhibited itself in new activities. To meet them the action upon the case was employed. The variety of malicious injuries so brought before the courts soon recalled into prominence the idea of malice as the secondary element of such wrongs. After this idea had become firmly established, it was not long before its more general validity and wider scope caused its superiority over



the element of conspiracy as a constituent of tort is being recognized. In a word, the strict action of conspiracy was rendered obsolete by the reappearance in the conscious thought of the times of the general conception of malice as a secondary element of tort.<sup>(19)</sup> This process will now be explained in detail.

So completely had the current conception of malice as the secondary element of tort under discussion found expression in the principle governing the remedy by writ of conspiracy, and so efficient, we may be permitted to believe, was this remedy in reaching the most prominent class of malicious injuries then judicially noticed, that express reference to malice in conspiracy cases of the period from the reign of Edward II to that of Henry VII (A.D. 1307-1504) practically ceased.<sup>(20)</sup>

But even at this time a tacit idea of the significance of malice lingered in the legal thought of the times. Its presence may be detected in the qualified immunity from suit granted to witnesses, justices, and attorneys concerned in an unsuccessful prosecution for crime. Such persons could not be held liable for what they might do in the regular and impartial discharge of their official duties, but if they went further and took any extra-official part in the prosecution, their protection ceased. We can readily conjecture that this principle flowed from the conception of malice. Such persons, we should say to-day, must be presumed to act without malice, so long as they confine themselves to their official duties. But this presumption does not relieve them from the consequences of improper conduct, prearranged plans, and the like, because these clearly evidence a malicious intent. Thus this conception was the real found-





ation of the above immunities and marked out their limits as early in the remark of the court in the case of Berlinton vs. Pittfield, 21 Keb. 587 (21 Car. 2 - 1629): "Strict proof of malice in this case or a justice is requisite, and procuring witnesses is no prosecution."

The official positions occupied by the defendants who claimed an exemption from liability under such circumstances, and the reasons upon which their exemption was ostensibly based,<sup>(a)</sup> prevented an express statement that malice was the real ground of action in conspiracy cases. Express recognition of the importance of malice first recurred during the reign of Henry VII, a case wherein a false accusation had been preferred in good faith by a private individual.<sup>(a)</sup> Here the court said, "to each sessions all men may come for the common profit, and if they come with that intent, and for the zeal that they have for justice, and not from malice, they act sufficiently for the common profit.....and if it was from malice, the matter would be otherwise." The idea thus suggested was taken up and developed by the courts during the reigns of James I, Charles I, and Charles II. The judges analogized the term "malice" more frequently. They gradually came to perceive and to state more clearly that the essential elements of the torts redressed by action upon the case in the nature of conspiracy were the damages suffered by the plaintiff, and the malicious intent prompting the defendant's acts.<sup>(b)</sup> "Malice" was still used in its popular sense. It signified malevolence, "as for unjust revenge."<sup>(b)</sup>

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(a) Y.B., M. 20 Henry VII, f. 11; Kellway vs. M. 11. and 20 H.  
(b) Note by Lord Coke in Poulterers' Case, 9 Co. 56 b.



Contemporaneously with the gradual increase in the consciousness of the importance of malice, the action upon the case was being extended to afford a remedy for false prosecutions for trespasses and for ecclesiastical offences, for arrests in civil cases, and for prosecutions upon defective indictments and before courts without jurisdiction. This extension advanced the growth of the conception of malice, although in most of the cases of this class no express reference to malice was made. Such cases provided the courts with varied specimens of malicious acts causing damages. As the specimens became sufficiently numerous to be made the basis of generalization, it became evident that the common element of malice and damages were the bonds connecting even the most heterogeneous of them. In the same manner, the development of the doctrine of probable cause, which was rapidly progressing during the same period, and reached its practical completion during the reign of King Charles II, threw much light upon the true significance of malice as an element of the torts under discussion. This doctrine supplied the courts with a much-needed principle to guide them as they extended the action upon the case to new circumstances. It eventually became a fundamental condition for recovery in such actions that the plaintiff should prove that the defendant had ordered his arrest without a reasonable cause to believe him guilty. Maturer thought was not long in recognizing that the absence of probable cause is nothing but a more or less accurate test or measure of malice, and thus bringing into clearer view the real part played by malice as an element of tort.



During all the period in which the true conception of the significance of malice was being slowly and painfully worked out, and for some time after it had become practically complete, the old strict action of conspiracy remained theoretically intact, although it was never resorted to. The principles relating to it were frequently stated and affirmed by the courts, even in cases in which they were basing the plaintiff's right to recovery upon the malice of the defendant. At first sight the long co-existence (in theory) of the two forms of action is surprising, in view of the superiority of the conception upon which the action upon the case was built. Two causes, however, may be assigned to account for the length of time which elapsed before the incompatibility of an action founded upon malice with the strict action of conspiracy was perceived, and the latter driven into obsolescence. The first was the fact that the courts had lost sight of the true significance of conspiracy, and had ceased to regard it as a mere evidence of malice. The term had come to connote the act commonly performed by the conspirators as well as to denote the plurality of the performers. "Conspiracy" always carried with it the suggestion of a false prosecution. For many years after the introduction of the action upon the case for malicious prosecutions, this remedy was called "an action upon the case in the nature of a conspiracy." The writ by which it was begun always contained an averment that the false prosecution had been instituted as the result of a conspiracy - "conspirations inde practis illa" - even in cases in which only a single defendant was named. And in the digests of the period between the



reign of Henry VIII and that of Charles II, cases of religious persecution, whether against a single defendant or against several, are all listed under the caption "conspiracy". The word thus having become a vocabulum legis, with a special formal meaning quite different from its primary significance, the validity of the conception expressed by it as the ground of a civil remedy was not really perceived to be undermined by the growth in the conscious thought of the times of the conception of malice as the true secondary element of actionable false prosecutions.

The second reason was the fact that this conception of the importance of malice was worked out through the medium of the action upon the case, which began to be employed as a remedy for false accusations almost simultaneously with the reappearance of that conception. For a long time the courts busied themselves in extending redress through this new form of action to the many cases in which the strict action was powerless to afford relief, in developing the doctrine of probable cause, and in coming clearly to base the rights of the plaintiff upon the damage suffered by him and the malice of the defendant. Not until they had arrived at a comparatively matured conception of the significance of malice in such cases did the courts begin to compare the new remedy with the old, and to inquire into the relations existing between them. These considerations explain why the strict action of conspiracy was preserved from the disintegrating effects of the new conception of malice until the latter had become sufficiently developed to destroy





the old action in a bill.

Comparisons between the two forms of action, leading to the analysis of their basic conceptions which were fatal to the older form, were first instituted, it is curious to note, as a direct result of the conservation of the courts in retaining the new and as early as possible of the attributes of the older action <sup>in</sup> developing the new. It was often important to determine whether the action brought was an action of conspiracy or an action upon the case. The similarity of the two proceedings made necessary a close examination of their legal characteristics in order to distinguish them. The discussion thus inaugurated, though at first productive of a great deal of confusion and contradiction, revealed the vital differences between the two remedies. The result was the establishment of the broad principle that the action of conspiracy should be confined to cases wherein there had been a combination such as would subject its members to the villanous judgment - that is, a combination falsely and maliciously to indict of a capital crime. In such cases, if the action were based upon the conspiracy as the principal element of the wrong, the other facts being alleged by way of aggravation, it was an action of conspiracy. In all cases in which the principal accusation had been preferred by a single defendant, or even in which a conspiracy was alleged but the emphasis placed upon the acts causing the damage, the mention of the conspiracy being by way of aggravation, the proceeding was said to be an action upon the case. (24) In this manner the two forms of action were drawn into sharp contrast with each other.



So stood the law when the great case of Deville vs. Roberts, 9 and 10 William, III (A.D. 1698) arose. In this decision, which supplies the foundation of modern doctrine relating to malicious prosecution and is still quoted as a leading case, the various principles which we have been discussing separately, were woven into a single, harmonious fabric. The transition to the conception of malice and damages is the true essential (as recovery is an action upon the case for malicious prosecution was completed). Confusion of thought resulting from the numerous attempts of former times to inject principles valid within the field of the action of conspiracy into the field of the action upon the case was cleared away. The inadequacy of the mere conspiracy as the foundation of a civil action was pointed out, and the transition of the new proceeding over the old was openly recognized.

Roberts brought an action upon the case in the Court of Common Pleas against Deville,<sup>(a)</sup> alleging that the latter "maliciously and wickedly intending to oppress the plaintiff, caused him to be maliciously indicted of a riot," and recovered a judgment for eleven pounds damages. The defendant then sued a writ of error into the Court of King's Bench, where, after several arguments, the judgment of the lower court was affirmed. Lord Holt, in his opinion, emphasized the principle that the damage suffered by the plaintiff was the true ground of the action. If a person suffers loss by reason of a false and malicious prosecution, "it is reason and justice that he should have an action to repair him the injury; though of late it has been questioned, yet it has always been allowed formerly..... But it was so objected against the similarity of the old writs

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(a) 13 Mod. 808.



that these actions were grounded upon a conspiracy, which is of an odious nature; and that without conspiracy they are not maintainable; but he said: It is answered that the conspiracies were nothing in these cases; that was not the ground of these actions, but the damage done to the party; (25) for, if there be never so great a conspiracy to indict a man, yet if nothing be done in pursuance of that conspiracy, the party can have no action. Now if it can be prosecuted maliciously for a trespass, either with or without a conspiracy, it is the same thing; the trouble and expense is the same; and I take it, that wheresoever an action of conspiracy is maintainable against two, there it is by a malicious prosecution by one, cause will lie. These actions of conspiracy in the old books were really but actions upon the case: but conspiracy properly so-called does not lie unless the party were indicted of a capital crime." (26)

Lord Holt says further that malicious acts causing damage always give the injured party a right of action, even in some cases where the malicious prosecution is a proceeding in the civil courts. Still, he cautions, (a) "though this action does lie yet it is an action not to be favored, and ought not to be maintained without plain and express malice and injury. Therefore, if there be no scandal or imprisonment, and imprisonment found, no action lies, though the matter be false; yet if the indictment be fairly presented, no action lies; so if the Court has a jurisdiction, though the matter be scandalous, yet if there be no malice, no action lies. But in the case before us, the verdict has found express malice, and therefore judgment ought to be affirmed."

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The same points arose again in the case of Jones vs. Ryan, (a) decided a few years later, when in an action upon the case had been brought upon a false and malicious indictment following the trade of "horn-labels" without a license. The above decisions were reaffirmed and applied with extensions and improvements.

These two cases mark the culmination of the legal process whereby the courts had been gradually refashioning the basic principles relating to the action upon the case for malicious prosecution as it exists to-day. The courts clearly and authoritatively announce that, not conspiracy, but damages flowing from the malice of the defendant, are the essential grounds of recovery. The old action of conspiracy was not in terms declared obsolete. But the action upon the case was so broadened in its scope that it became available to redress not only wrongs beyond the operation of the older remedy, but also torts where the old action might still reach; and in competition with the new form of action the action of conspiracy immediately succumbed. Henceforth the activities of the courts are confined to clearer statements and logical extensions of the principles laid down in the above cases. The terms employed receive further elucidation. A more objective conception of malice, making the latter nearly co-extensive with the absence of legal excuse is evolved, and the significance of probable cause and other evidences of malice is disguised. (b) These, however, fall outside of our review. Our interest in the tortious activity out by the civil courts ceases with the disappearance of the

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(a) 10 EOH. 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.





conception that conspiracy is in itself a confidential element of tort. From this time on our attention will be centered upon the criminal aspect of conspiracy, until at the close of the nineteenth century the results flow from the decision of Allen vs. Flood,<sup>(a)</sup> coupled with certain modern industrial conditions, again force the conception of conspiracy to occupy a position of prominence in civil cases.

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(a) 77 L.T. Rep., U.S., 717 (1898).



## CONSPIRACY

### THE CRIMINAL LAW OF CONSPIRACY, FROM THE EARLIEST

### PERIOD UNTIL THE PRESENT TIME IN THE

### UNITED STATES

Although the Ordinance of Conspiracy (21 Ed. I) and the  
Artificial Super Statute (22 Ed. I) were intended to deal with the  
civil remedy for conspiracy, they both contain elements of a  
criminal offense.<sup>(a)</sup> There is a clause in the Definition of Con-  
spirators which evidences a criminal liability for a conspiracy.<sup>(b)</sup>  
Not until the fourth year of the reign of Edward III (A.D. 1330),  
however, was a statute passed exclusively devoted to the crim-  
inal aspect of conspiracy. This statute is as follows: "Item,  
Where in times past diverse people of the realm, as well great  
men as other, have made alliances, confederacies, and conspir-  
acies, to maintain parties, riots, and warres, whereby many  
have been wrongfully disinherited, and some renowned and highway-

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(a) The infliction of penalties of fine and imprisonment upon  
persons found guilty of conspiracy is a civil proceeding, in  
addition to the damages awarded to the plaintiff, does not fall  
in with our modern ideas respecting the separation which should  
be made between civil and criminal procedure.

(b) The significance of the provision contained in the Definition  
that "Justices assigned to the hearing and determination of  
felonies and trespasses should have the benefit of the law  
already been allowed to. See also, p. 2.



... and some for fear to be seized and taken, might not sue  
for their right, nor complain, nor sue during the inquests eyre.  
Their verdicts, by the great bulk of the people, is it awarded,  
That the justices of the one bench and of the other, and the  
justices of assize, throughout their term to hold assize sessions,  
as to such inquests upon hisi pryor shall inquire, hear, and de-  
termine, as well as the King's suit, be at the suit of the eyre,  
of such misdoings, breaches and conspiracies, and also of them  
that commit cheatery, and of all other things contained in the  
aforesaid article, as well as justices in eyre should do if they  
were in the same county. And that which cannot be determined  
before the justices of the one bench or the other upon the Risi  
Pring, for the shortness of time, shall be adjourned unto the  
place whereof they be justices, and there be determined as right  
and reason shall require<sup>(a)</sup>

Fourteen years later (15 Ed. 3 - A.D. 1344) it was enacted  
by parliament that exigentis should be awarded against "barrat-  
ours, confederours, and maintainers of false quarrels."

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(a) Of this statute Wright ("The Law of Criminal Conspiracies,"  
etc., p. 14, n. 7) says: "The 14 Ed. 3, c. 11, conspiracy  
effectively criminal, by directing the justices of either bench  
or of assize in sessions to hear and determine conspiracies and  
maintenances." But it does not in reality create an entirely  
new criminal liability for conspiracy. The very terms of the  
act evidence a pre-existing liability. It will be noted that

Justices as hisi pryor are simply involved with the jurisdiction  
already exercised by justices in eyre. If, therefore, this  
statute rendered conspiracy for the first time "effectively  
criminal", it must have done so by increasing the machinery for  
prosecution.



The above evidence is sufficient to show that the criminal procedure relating to the punishment of conspirators. The common law, as has been shown, has always placed a personal liability against conspiracy. The evidence of that offence was governed in the Definition of Conspiracy. It was left for the courts gradually to develop and improve the law applicable to illegal combinations and to what might be termed conspiracies until they brought it to the position which it now occupies.

During the period between the reign of Edward I and that of Charles II, the criminal aspect of conspiracy was far less important than the civil. With the exception of several cases, reported during the reign of Edward III, the record practically no criminal prosecutions for conspiracy.<sup>(1)</sup> In the few such cases which we do find, the conceptions worked out by the courts in connection with civil actions of conspiracy are closely followed. The offence included both solicitation to commit a crime, the commission was not punishable apart from the act performed. The same immunities were enjoyed by individuals, partners, and witnesses. The party under indictment have been acquitted by verdict. In general, the principles governing the civil and the criminal proceedings were substantially the same.

The expansion of the criminal law of conspiracy began during the reign of Edward III, was accelerated in the reign of Henry VIII and James I, and had made its most important progress by the end of the reign of George III. In comparing this course of evolution with that undergone by the civil law of conspiracy, we are struck with two main differences. First, the principle that several persons could be punished jointly for conspiracy is





a very unpleasant to be evil is found. Indeed, although the spread of individualism was hastened and supported by the narrow conceptions at the basis of the civil law of conspiracy, it was considered as difficultly flowing from a technical form of procedure which had to be respected.

Our treatment of the development of the criminal law of conspiracy will be divided into two parts: first, we shall trace the rise of the principle that the bare unexecuted conspiracy is a complete offense; second, we shall trace how the classes of combinations possible as conspiracies increased.

The language of the Definition of Conspiracy is broad enough to include combinations which have performed an act. It appears, however, that an unexecuted agreement to do evil was first declared punishable during the reign of Edward III,<sup>(2)</sup> and by an unsupported judicial determination. Moreover, this declaration took place in connection with the offense of "confederacy", which though apparently within the limits of the Definition of Conspiracy, was soon differentiated from "conspiracy strictly so-called, and embraced combinations to commit maintenance of wrongs only.

There is no other source upon the subject of unexecuted conspiracies than a case in Richard II (A.D. 1377)<sup>(3)</sup> arising out of a civil action upon writ of conspiracy. Waddell, J., said, "a man will have writ of conspiracy although they did

(2) Bellamy's Case, Term. Richard II, 1, 10, 11, 12.



nothing but the confederacy together, and they will recover damages, and can be noticed of this kind, and the point."

The great impetus toward the principle that an unexecuted conspiracy is criminal came from several cases decided by the Court of Star Chamber at the beginning of the 17th century. (3) The act creating this extraordinary tribunal<sup>(a)</sup> was held to have invested it with primary jurisdiction over all crimes perpetrated by combinations of persons. Influenced in part by the precedents supplied by confederacy cases, and by the theoretical importance assigned to the element of combination in civil actions of conspiracy, as well as by the conditions of the times, the judges of the Star Chamber soon came to look upon the conspiracy itself as the "principal matter" to be noticed. The extreme flexibility of proceedings in this court and the broad scope of its authority permitted a free development of the tendency just mentioned. The result of the inter-action of these conditions can be seen in a line of decisions culminating in the famous Poulterers' Case,<sup>(b)</sup> 1 James I (A.D. 1610), wherein, after a full discussion of the law, it was said that a bare conspiracy is punishable independent of any act done in execution of it.

The plaintiff in the Poulterers' Case had instituted proceedings in the Star Chamber against the defendants for a conspiracy false, to charge him with robbery, upon which charge the grand jury had returned an ignoramus. The defendants relied upon

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(a) St. 3 Henry VII, cap. 1.

(b) 2 Co. 267.



the settled principles of the common law that no action or indictment for conspiracy could be entertained unless the plot had been legally executed by verdict. The court, however, refused to dismiss the bill. After stating that at common law an innocent person was protected by the bill de odio et atia in the interval between the laying of a charge and the finding of an indictment, the judges say: "And it is true that a writ of conspiracy lies not, unless the party is indicted and legally acquiescing, for so are the words of the writ; but that a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution, is full and manifest in our books". The authority cited in support of this proposition consists in (1) the confederacy case above referred to, which appears in Item five of the "Articles inquired of by Inquest of Office," anno 17 Ed. 3, (A.D. 1354), and the language of the Items six and nineteen of the same "Articles". (2) The anonymous case anno 18 Richard II (A.D. 1393) also mentioned above. (3) The clause in the usual commissions of oyer and terminer giving the commissioners the power to inquire "de omnibus coadunacionibus, confederacionibus et falsis alliganciis." The court continues: "In these cases before the unlawful act executed the law punishes the coadunation, confederacy, or false alliance, to the end to prevent the unlawful act.....; and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it." After a hearing, therefore, the defendants were punished by fine and



imprisonment, and one of them was branded in the face with the letters "F.A.", for "False Answer."

Although the judges profess to base their decision in this case upon the common law, the Proletarians' Case represents a last step in reversal of existing principles. The precedents cited do not sustain the decision. The language employed in the "Articles Invented or of Invented of Offense" (20 L.J. Rep., 44), the case there noticed, and the Lord of the Commons of Oyer and Terminer all apply to conspiracy - a combination for an evil purpose, so to sure, but one false different in its nature from conspiracy strictly so-called.<sup>(a)</sup> The case cited from the case anno 19 Richard II was undoubtedly erroneous in as far as it applied to the civil action of conspiracy, and we have every reason to believe that it was an equally inaccurate statement of the doctrine relating to the criminal aspect of the offense. On the other hand, the holding in the Proletarians' Case was utterly opposed to the opinion current at that time between the civil and the criminal law of conspiracy that the offense was not complete until the person injured had been indicted, tried, and acquitted by the verdict of twelve men.

It is to be noted, however, that the importance of this decision lies not so much in what is contained in the ratio decidendi as in the manner in which the doctrines laid down in it were understood and applied. The general statement that conspiracy is itself a crime is unlawful. The case really decided nothing more than that persons guilty of concerted

(a) See Note 2, p. 16.





efforts to secure the conviction of an innocent person upon a capital charge may be punished for conspiracy although the false prosecution ended otherwise than in a conviction by verdict.<sup>(1)</sup> This principle is consonant with those of the common law as explained by Bracton and declared in the Edwardian statutes of conspiracy.<sup>(2)</sup> The decision given to the law by the Peckham's Case so interpreted was practically identical with the corresponding provisions being made by the civil law relating to the same class of offenses under cover of the remedy by action upon the case. In the later cases, however, the principle broadly laid down that the bare conspiracy is punishable was looked upon as having been settled by this decision. A doctrine probably valid as to a limited class of evil combinations thus came to be extended over the entire field of such enterprises. The Peckham's Case, therefore, in view of the effects actually produced by it, must always be regarded as one of the historic landmarks upon the highway of English legal history.

The Peckham's Case was cited and confirmed in Smith's Case<sup>(3)</sup> (anno 9 Jac. - A.D. 1611) and in Taylor and Tawell's Case<sup>(4)</sup> (anno 4 Car. 1 - A.D. 1626), both Star Chamber cases.

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(1) In Ex parte W. Taylor, Bro. Jan. T (1874), it was said obiter that where two conspire to indict a person falsely, and the grand jury returned an ignoramus, no writ of habeas corpus lies "because the party was indicted and acquitted, yet so as to be indicted upon conspiracy is common law for this false conspiracy and maintenance, which is punishable as common law."

(1) 12 Co. 50.

(2) Goldb. 444.



re-echoed the facts were identical in principle with those of the earlier case. The statement was an unadorned conspiracy in an offence, his able is not with for the first time in the Court of King's Bench. In an obiter dictum in People's Case <sup>(a)</sup> (anno 13 Jac. 1 - A.D. 1603). It was repeated, obiter, upon the authority of the Poulterers' Case, in Smith vs. Mansfield, <sup>(b)</sup> also in Rex vs. Timberly, <sup>(c)</sup> (anno 13-14 Car. 2 - A.D. 1662), wherein, as in the Poulterers' Case, acts had been performed in execution of the conspiracy, but the enterprise had not been such as would constitute a formed conspiracy in the strict sense. In Rex vs. Starling (or Sterling), however, another case of surpassing importance, decided anno 15 and 16 Car. 2 (A.D. 1664), it was authoritatively laid down, upon an appropriate set of facts, that a conspiracy is a crime quite apart from anything done to carry out its purpose.

An information had been laid against Sterling and others, brewers of London, charging that in pursuance of an illicit conspiracy to impoverish the King's subjects they had given orders that no more little "servois", called "gallon-beer", a commodity largely consumed by the poor, should be brewed; and that ale should be sold only at a certain price. By these means, it was alleged, the defendants designed to excite the common people to riotous acts against the exchequer, in order that the latter might be impoverished and be disabled to pay their debts to the King.

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- (a) 11 Co. 93 b.
- (b) Palm. 315.
- (c) 1 Sid. 68.



Upon a plea of "not guilty", the defendants were found guilty of assembling and committing to the service the excise men, but not guilty of the other facts charged. The prisoners' counsel accordingly made motion by arrest of judgment, arguing that the only fact found was the conspiracy, and that the only conspiracy punishable without overt act "must be such as concern the public, which does not appear here in this general charge, but an injury to the farmers by particular name." (1)

Counsel for the King replied that since the effect of impoverishing the farmers of the excise would be a diminution of the King's revenue, this conspiracy was a great offense "of public concernment." Moreover, a conspiracy to injure any third party is punishable. Again, although the mere conspiracy is an act ad inuicem, the communication of it is an overt act, and punishable "though nothing ensue thereon". The conspiracy is the crime, and the other acts are but "particular instances of it," of value only as evidence.

The court unanimously over-ruled the motion. Keeling, J.<sup>(b)</sup> was of the opinion "that this bare conspiracy is a great crime, where it is to do that which is evil, although to a private person; so is the Poulterers' Case." But the conspiracy in question, he continued, was of a public nature, as it touched the King's revenue. Windham, J., "conceived it a point of weight and difficulty.....They are convicted of conspiracy, and properly is where it's to indict men for their lives, and this

(1) 1 Keb. 826.

(b) 1 Keb. 878.



is that whereas the first point, whether false suggestion and action by mutual agreement to maintain hostility, is rejected as no confederacy. Also, . . . . If it were a conspiracy, where ought to have been some overt act suggested; as if it be justified for obstructing, or being a witness thief, or barrister, or confederator, and as to this there is no difference between indictment and an action or information: I do conceive the defendants found guilty of confederacy, as in the Poulterers' Case." After stating that the offence was of a public nature, he continues, "I agree that general confederacy, without designation to public or private end, is punishable by action upon the case . . . or by indictment, in 19 Richard II in Poulterers' Case is according (sic); and therefore I do conceive there is enough found to give judgment against them for a confederacy, in their assembling together, their consultation and conspiracy, which is as much a false alliance, as if they had bound themselves by oath."

Twisden, J., held that the defendants were guilty "of an unlawful assembly, and of a conspiracy. . . . Also, 13460, which private, is fluctuating, and so cannot be punished, but, when it is declared by act, it's punishable; also, voluntas non reputabitur pro facto; . . . that is, it shall not be punished so fully, but it is still punishable: The false alliance or binding by oath, is not a farther degree of conspiracy, which is all one and synonymous with confederacy, and of which the assembly and consultation is sufficient fact."

Sterling was accordingly fined 1,000 pounds, or others 500 pounds each.





The language of the court is confused in parts, but several points stand out clearly: (1) The declaration that the mere combination to do evil is a crime is part of the ratio decidendi. (2) This principle is based upon Whitely v. McGregor in the Poulterers' Case and in Burn's Case, and is not supported by what was actually decided in these cases. (3) Although Wyndham, J., correctly distinguishes between confederacy and conspiracy, the tendency to widen the principles applicable to the former until they should include all unlawful combinations, and to merge the latter within the term "conspiracy", is plainly apparent. (4) The real advance shown by this case over the Poulterers' Case lies in the nature of the overt act decided to be necessary to evidence the conspiracy: Whereas the overt act in the Poulterers' Case was an unsuccessful prosecution, the overt act in Stierling's Case was the mere consultation and agreement. (5) The modern view as to the nature of the offense and the connection between the conspiracy and the acts done appears for the first time.

In several cases decided soon afterward, however, the court seems to hesitate to apply the doctrine of Stierling's Case. In Ex. vs. Taylor and Ward,<sup>(a)</sup> the punishment of the defendants was lightened because the conspiracy had been unsuccessful. In Ex. vs. Armstrong et al.,<sup>(b)</sup> counsel for the defense argued that a bare conspiracy without overt act is not indictable, and cited the Poulterers' Case. The court answered that there had been "as much overt act as the nature and design of this conspiracy,"

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(a) 3 Keb. 399 (20 Car. 2-A.D. 1668).

(b) 1 Vent. 401 (15-9 Car. 2 - 1707).



admits," instead of saying the original reference that the con-  
spiracy itself is the crime. And to Reg. vs. Pickering et al. (a)  
the court even declared obiter that an information for conspir-  
acy would not lie unless the overt act be proved.

The law was settled finally by Lord Holt. Upon this great  
judge, however, experienced some vacillation of mind before arriv-  
ing at a final conclusion. In Exile vs. Roberts (b) he declared  
obiter that "conspiracy, though nothing he seems apprehension, is a  
crime, and punishable at the suit of the King." But in Reg. vs.  
Daniell (c) he agreed with the counsel for the defense that a con-  
spiracy to prosecute an innocent man upon a false criminal charge  
is not indictable unless executed, although he seems to think  
that a conspiracy to rob or kill a man, or to charge him with  
the paternity of a bastard child, might be punishable without  
more. (d)

Lord Holt's ultimate opinion to be found in the great case  
of Reg. vs. Best et al. (A.D. 1704-5). The defendants had been in-  
dicted for a conspiracy to extort money from one Pickering by  
falsely charging him in public places with being the father  
of a bastard child. A motion to quash the indictment being  
over-ruled, a verdict was entered, upon two grounds: (1)  
"that it does not appear that anything was done in pursuance  
of the conspiracy, and that none to appear answering

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(a) 3 Mod. 177, (29 Car. 2 - 1677).

(b) 12 Mod. 208, 209.

(c) 6 Mod. 100 (2 Anne - A.D. 1703).

(d) This conflict really disappears if we hold to the dis-  
tinction between "conspiracy" and "unperformed". In Exile vs.  
using the terms synonymously.

(e) 6 Mod. 185.



to the Faulstich's Case." (2) The indictment contained no averment of Pickering's innocence of the charge. Such averment, it was insisted, was necessary, upon the analogy of an accusation of perjury, wherein the falsity of the statement sworn to must be proved.

Lord Hail said: "Four cases of perjury is not like this, for there the crime consists in the fact sworn, and the matter is indifferent until the averment of truth comes; but here is a confederacy to charge a man false, heinous, malicious, etc..... This indeed is not an indictment for a formed conspiracy, strictly speaking, which requires an infamous suggestion, and loss<sup>of</sup> liberty liberty, as upon conviction or an attainder, and for which an indictment will not lie until acquittal or an ignominious conviction. But this seems to be a conspiracy liberty liberty, or a confederacy to charge one falsely, which sure, without more, is a crime; and it is a crime for several people to join and agree together to prosecute a man right or wrong. If in an indictment for such confederacy you proceed further, and shew a legal prosecution of the confederacy, there you must shew the event thereof, as ignominious returned on the indictment, or an acquittal, or else the indictment fails; but where you rest upon the confederacy, it will be well without more."

The whole court held "that the very agreeing together to charge a man with a crime falsely is a consummate offense, and indictable." They believed, also, that the lack of an averment of Pickering's innocence was not fatal to the indictment, and hence gave judgment for the Queen. The doctrine laid down is



was summarized in another report of 1748 case:<sup>(a)</sup> "The conspiracy is the list of the individuals, and that, cannot act till the time in prosecution of it, it is "considered as a continuous offense of itself"; and whether the conspiracy be to cause a temporal or ecclesiastical offense on an innocent person, it is the same thing."

The case was re-argued during the Easter term of the following year. The point that seemed to "stick each with the court"<sup>(b)</sup> was the absence of any statement that Roderick was innocent. The question of the criminality of the bare conspiracy, however, was raised again, and Lord, Sergeant, argued that such a combination "stands singly upon the intention"<sup>(c)</sup> and is not criminal unless something come of it, "For it is the damage the party receives by the conspiracy, that makes it criminal." The court finally held to its former decision. They cited precedents wherein "a conspiracy without any further act done was held to indictable."<sup>(d)</sup> Lord Holt said further:<sup>(e)</sup> "If two or three persons meet together and discourse and conspire how to accuse another false or an offense, it is an overt act, and is an offense indictable. So if two or three meet together to conspire the death of the queen, yet though there was nothing but words passed, the very assembling together was an overt act."

The case of Reg. vs. Bell contains a fuller discussion of the law relating to this phase of our subject than is to be

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- (a) 1 Salk. 174.
- (b) 3 Ed. 4. 1187.
- (c) 11 Mod. 35.
- (d) 3 Ed. 4. 1187.
- (e) 11 Mod. 55.





found in my preceding work. Lord Holt found distinction in the ancient distinction between conspiracy and confederacy. This distinction, however, soon lost all importance. Confederacy so widened its scope that it came to include all unlawful combinations except those comprized within the narrow class of conspiracies strictly so-called. And when the dominion of the civil action of conspiracy was rolled the term "conspiracy" of its special significance, it was appropriated to all unlawful combinations and subjected to the principles worked out under the cover of the offense of "confederacy."

From the time of this decision the principle that a mere conspiracy is punishable as a crime was accepted with little question. Counsel argued for the last time against this proposition in *Rey vs. Kimmersley and Moore*<sup>(a)</sup> (5 George I - A.C. 1719). The objection was vigorously combatted by counsel for the King, and was brushed aside by the court with little ceremony. From this time on, attention is centered largely upon the nature of the offense of conspiracy and the relation between the various elements composing it.

We turn now to a discussion of the unlawful purpose which transforms a combination into a criminal conspiracy.

During the period of the dominance of the civil action of conspiracy, practically no combinations were included within the offense technically so-called except combinations to enter false accusations of capital crimes. In this respect the criminal

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(a) 1 Str. 193.



center followed the practice of the royal courts. The exceptional civil actions of conspiracy entertained during the reign of Edward III are paralleled by several exceptional criminal prosecutions during the same period. In all these criminal cases, however, the prisoners escaped punishment in one way or another. After this reign the rigidity and narrow scope of the civil law relating to conspiracy appear to have been reflected in the conception of conspiracy in its criminal aspect.

The germinal origin of the modern law of conspiracy, looked at from the viewpoint of the illegal purpose as well as from that of the element of combination, seems to be the clause of the Definition of Conspirators relating to the retention of men in the country "with liveries or fees for to maintain their malicious enterprises and to suppress the truth." From this portion of the Definition sprang the offense of "confederacy", through the medium of which many important principles relating to concerted wrong-doing were developed. By the 27th year of the reign of Edward III, (A.D. 1354) confederacy had been used to include a combination between two persons whereby each had agreed to "maintain the other whether their matter were true or false."<sup>(a)</sup> As time went on, the scope of the offense was gradually broadened to reach other kinds of evil combinations, which later formed the basis of generalizations. But the same progress even in this direction was made possible by the above described shift of emphasis from the act to the combination as the gist of the offense. When the courts arrive at the conception

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(a) 27 Lib. Ass. 100, p. 156.



that the criminality lies in the intent, as manifested by overt acts, they can readily bring within the definition of conspiracy combinations for an indefinite number of objects.

The tendency to enlarge the class of unlawful combinations first operated in the direction of agreements to perform acts directly harmful to the public.<sup>(5)</sup> The first suggestion that combinations of this character are punishable is to be found in Harr's Case<sup>(a)</sup> (13 Jac. 1 A.D. 1613), wherein the principle is announced obiter, and without the citation of any authority. It may probably be traced ultimately to the judicial practice already adopted in reference to conspiracies to commit treason, wherein the combination, as evidencing the treasonable intent, was punished because of its direct influence upon the public weal. Such a principle fully accorded with another analogous opinion which favored the protection of the rights and privileges of the King whatever might be the effect upon <sup>the</sup> conflicting interests of individual citizens. It was applied in Sterling's Case to a combination to reduce the King's revenue by impoverishing the farmers of the excise, and was extended in the later cases. To principle this can be attributed the illegality of the combination known as in Verburgh vs. Lord Clive,<sup>(b)</sup> wherein the military officers of the East India Company had sought to force concessions by simultaneously resigning their commissions. The same is true of the various conspiracies to hinder or pervert the administration of justice, to defraud the government, and generally to do acts directly harmful to the public welfare, which are so frequently

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(a) 11 Co. 93 b.

(b) 4 Burr. 2472 (10 George III - A.D. 1769).



met with during the sixteenth and early nineteenth centuries. This principle lends itself to the accomplishment of great intentions in the distribution of judgments, and some of the best important innovations in the law were made in connection with cases of this character.

A second ground of progress in the case law was found in a line of cases, contemporaneous with the above, in which, starting from the offense of conspiracy strictly so-called, the courts were gradually and naturally led to treat as criminal various combinations to defame and to extort money by black-mail. This phase of the development of the criminal law of conspiracy is closely analogous to the contemporaneous process of growth in the civil law whereby the action upon the case was made to reach new classes of wrongs. Thus punishing combinations to enter false charges of a capital crime it was an easy step to punish conspiracies to charge an innocent person, whether in court or merely in public places, with the intention only to embarrass or to spiritual distresses.<sup>(4)</sup> In time the courts followed closely the analogy between cases of this nature and those in which there had been an actual prosecution upon the false accusation in court. But since practically all of these conspiracies to defame were at the bottom remedies of black-mail, the attention of the courts was fastened upon the intent falsely and unjustly to extort money from the injured person. Thus they came to hold generally that a combination to extort money by a false defamatory charge is a criminal conspiracy. When





this principle is a very foundation to the still broader one that a good law to injury another person or any illegal action is criminal. In this broadening the conception of conspiracy has been extended very far. Still, the direct connection between combinations of the character under discussion and the primitive offense of conspiracy technically so-called is manifest and interesting.

Combinations to cheat or defraud are among the most important criminal conspiracies brought before the courts of the present time. The doctrine that they are criminal offenses, however, had a special origin, and was not such an obvious and natural deduction from older settled principles as were those which we have just been breaking. The earlier courts exhibited a tendency to punish cheating, whether engaged in by one or by several persons. The element of conspiracy, if noticed at all, was considered merely as matter of aggravation. In Reg. v. Whentley <sup>(a)</sup> (1 George III A.D. 1766), however, Lord Mansfield said that "all indictable cheats are where the public in general may be injured; as by using false weights, measures, or tokens;.... or where there is a conspiracy." This decision was attacked by counsel in Reg. v. Lorr <sup>(b)</sup> (38 George III, A.D. 1800), but Lord Kenyon recognized its authority. "There must either be a false token or a conspiracy", he said, otherwise a cheat is not indictable. <sup>(?)</sup>

These cases establish the principle that a cheat organized by a conspiracy is a crime. It was already the case

(a) 1 B. 21. 175.  
(b) 6 T.R. 565.



act of judicial legislation, and from the results from the increased importance attributed to the element of conspiracy in other cases, and the similarity between condemned parties and conspiracies to injure the public. And by a further piece of judicial legislation, it was decided in the leading case of Reg. vs. Hill and Cart,<sup>(a)</sup> that "there conspiracy to commit a crime."

Of still later origin was the doctrine that a conspiracy to commit a crime is indictable. The Statute of Henry VII, c.14 (A.D. 1485), enacting that conspiracies to destroy the King and his heirs shall be punished as felonies without overt act, settled that up to that time such conspiracies were not punishable. In Reg. vs. Parkhurst and Ellis,<sup>(b)</sup> an information had been laid against the defendants for a conspiracy and an attempt to rob Sir Robert Gaire, and John in wait, etc. The court said that the information would not lie in the absence of proof of an "overt act or attempt in wait"; on the verdict went, finally for the defendants "there being no certain appointment of time, place or person." In a later case,<sup>(c)</sup> Lord Holt said obiter that "if a meeting be to rob or kill, it can be indictable," and two years afterward he also remarked,<sup>(d)</sup> again obiter: "So if two or three meet together to conspire the death of the Queen, yet though nothing but words passed, the very assembling together was an overt act." These are the only instances in the old books wherein a conspiracy to commit a crime was treated as such.

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- (a) 1 R. and A. 344 (80 Henry III, A.D. 1210).
- (b) 31 Mod. 733.
- (c) Reg. vs. Burdett, 1 Mod. 400 (2 Anne - 1700).
- (d) Reg. vs. Best, 11 Mod. 18, (1705).



Consequences of this character were not to have seemed to be punishable until the complete separation between the criminality of the combination and that of the act done according to the general doctrine that a combination to commit an unlawful act is a criminal conspiracy.<sup>(a)</sup>

The doctrine that a combination to inflict an injury upon a third person is an indictable offense cannot be traced to any source. It was quietly accepted and applied by the courts in suitable cases without the aid of authority, and seems to have been a reflection from the other types of conspiracy, especially conspiracy to defraud, to which it bears a close affinity. The doctrine was first announced in Reg. v. Darnley.<sup>(b)</sup> Counsel for the King also argued that the "very conspiracy to do a criminal act to the prejudice of a third person is indictable in T.H.".... Keeling, J., agreed, obiter, "that this does apply to a great extent, where it is so to that house or mill, although to a private person: so is Pollard's Case." Windham, J., said: "I agree that general conspiracy, without assignment as public or private mal, is punishable by action upon the case or indictment. But this is cause to mitigate the fine, that it is only private." The first case formally in point is Reg. v.

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(a) The first general statement that a combination for a criminal object is itself punishable seems to have occurred in Reg. v. Darnley, 11 Mod. 203, 10 Mod. 203, 10 Mod. 203 (1701). Windsor v. Windsor, 11 Mod. 203, 10 Mod. 203, 10 Mod. 203 (1701), said: "An agreement to do a criminal act is indictable offense... amounts to a conspiracy." See Chapter 4.

(b) 1 Keb. 650.



Case<sup>(a)</sup> (5 George I - A.D. 1713), secretly introduced into a conspiracy to ruin the trade of the King's hard money by passing it upon the public into the hard-pan. This was followed by Ellenborough's case<sup>(b)</sup> (A.D. 1743), in which the defendants were punished for a conspiracy to carry away a false note in order to obtain the estate of the man, perjured. The mooted question here was whether there was sufficient evidence of a concerted intent "to do an injury to the person or estate of another." In Ham vs. Bosley<sup>(c)</sup>, several were convicted of a conspiracy to impoverish a tailor and prevent him "by indirect means" from carrying on his trade. It appears also from Hillford vs. Trowder<sup>(d)</sup> that Lord Mansfield considered unlawful a conspiracy to ruin an actor. Thus the principle that combinations illegally to oppress or injure a third person are punishable had been fairly settled by the beginning of the nineteenth century.<sup>(e)</sup>

Conspiracies to accomplish a merely personal purpose were scarcely noticed as such until the nineteenth century. The only eighteenth century case touching upon this subject is Ham vs. Delaval et al.<sup>(e)</sup> Lord Mansfield received information against the defendants for an alleged conspiracy to extort money from a girl sixteen years old from Sir Francis Delaval for purposes of prostitution, saying that "the general impression was somewhat

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- (a) 1 Stra. 144.
- (b) 1 Leach Cr. L. 38.
- (c) 1 Leach Cr. L. 274, A.D. 1783.
- (d) 2 Campb. 358. (1809).
- (e) 1 S. R. 110, 150.





attendance of the members of the House, Colonel to Lord Mount (i.e. the Count of Mount's House), as Charles Gordon of the nation.... Especially, when the offense is mixed with confederacy and conspiracy, as in the present case." Here, he is the first, since concerned with conspiracies to commit, the first of the offenses was the act done rather than the combination.

Conspiracies among merchants and others to raise the price of merchandise, and among workmen to enhance their wages, had found their way into the criminal courts during the period under consideration. We shall reserve our treatment of them, however, for a separate chapter. They may be classed under the general category of conspiracies to injure the public welfare.

By the end of the eighteenth century, the definition of criminal conspiracy included combinations for a number of objects beside those known to the older law. The courts, moreover, had little hesitation in looking beyond the proximate to the ultimate purpose of the combination in order to determine its character. The principle that a conspiracy to do a lawful act to an unlawful end is illegal arose comparatively early. It first appears in the argument of counsel in Rex vs. Stirling.<sup>(a)</sup> It was pressed upon and approved by the court in Rex vs. Edwards et al., though not strictly as part of the ratio decidendi. Its spirit is plainly evident in the conviction in Elizabeth Robinson's Case,<sup>(b)</sup> where there had been a conspiracy to marry under an assumed name for the purpose of obtaining title to one Rich-

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(a) 1 Mol. 220.

(b) 1 Leach Cr. C., 20. 20 George II - A.D. 1740.



and Holladay's estate. Upon the same principle you could say that a combination among the overseers of a parish to procure a marriage between paupers<sup>(b)</sup> for the purpose of relieving the expense of their maintenance upon another parish,<sup>(a)</sup> and a combination to find a girl prostitute, at an appointed place and for the ultimate purpose of prostitution. This principle became firmly established as a result of the holding in Rex vs. Eccles et al.<sup>(c)</sup> that if a conspiracy to accomplish an illegal purpose is charged, the means to be employed need not appear in the indictment at all. And in Rex vs. De Worchester et al.<sup>(a)</sup>, counsel for the defendants refused to admit "that to conspire to do a lawful act to an unlawful end is a crime", and endeavored to prove that the purpose of the combination under discussion was not unlawful.

We turn now to a discussion of a few of the more general aspects of the conception of conspiracy as developed during the period under review.

Although it had been settled by the Polliver's Case, Rex vs. Starling, and Reg. vs. Best that a conspiracy without more is a crime, the courts were rather loath to pursue their doctrine to its consequences. There are a number of statements by counsel and a few obiter dicta by the court that the conspiracy is the gist of the offense quite independent of the acts done. But the cases in which this principle was actually applied are rare.

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- (a) Rex vs. Edwards, 3 Mod. 210 (1723). Rex vs. Caplow, Cald. 246. (1732).
- (b) Rex vs. Belwell, 1 S. M. 410, 469 (1781).
- (c) Willes 583 (1783).
- (d) 3 M. and S. 66 (1814).



Court did counsel take that position only as a last resort. The general practice in conspiracy cases was to charge in the indictment that the prisoners had conspired to do per communi-  
cationem inter eos habitam. In most instances, the combination was treated as an element of the offense, or as matter of aggravation, the emphasis being laid upon the acts done. Thus, in cases in which a conspiracy to cheat was noticed, the earlier holding, as we have seen, was that a cheat accompanied by a conspiracy is indictable. Lord Holt even went so far as to say that in Reg. vs. Starling<sup>(a)</sup> "the gist of the offense was its influence upon the public, and not the conspiracy".....Lord Mansfield thus described the offense charged in Reg. vs. Bishop<sup>(b)</sup> "The crime laid is an unlawful conspiracy. This, whether it be to charge a man with principal acts, or such as only may affect his reputation, is fully sufficient. The several charges in the indictment are not to be considered as distinct and separate counts; but as one and the same united and continued offense, pursued through its different stages. And then it is clear, that the whole will amount to an indictable offense: viz, the getting money out of a man by conspiracy to charge him with a false fact."

In some cases, also, where the acts complained of had been done by a combination of malefactors, the element of conspiracy was not noticed in the indictment. In Scott, although the indictment alleged that the acts had been done "per consociationem", attention was fixed solely upon the acts performed, and the con-

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(a) Reg. vs. Starling, 1 Mod. 180. (2 Anne - c. 1. 1703).  
(b) 1 W. 30. 302. (2 Geo. 2 c. 11 - A.D. 1730).



reasoning resolved on further analysis. And also is considered as  
100. 11. 11. (a) See in Jurisdictional Failure, (b) See, to which it  
was held that the same was, was the gist of the offense, the  
acts were made described in some detail in the indictment, and  
the above principle was applied in Reg. v. 100. 11. 11. (c) See  
Tracy and not been properly alleged. (10)

The complete separation in respect to their criminality,  
between the two acts, the one act was done during the latter  
years of the reign of King George III. In Reg. v. 100. 11. 11. (a) See,  
the defendants had been convicted upon an indictment for a con-  
spiracy to intimidate one W. Booth, a tailor, and to prevent  
him "by indirect means" from carrying on his trade. In arrest  
of judgment it was urged that the indictment should have de-  
scribed the acts committed, in order that the defendants might  
know the particular charges against them. Lord Mansfield said  
that "this is certainly not necessary, for the offense does not  
consist in doing the acts by which the mischief is effected,  
for they may be perfectly indifferent, but in conspiring with  
a view to effect the intended mischief by any means. The illegal  
combination is the gist of the offense.".. This principle was  
confirmed in Reg. v. 100. 11. 11. (b) See and Reg. v. 100. 11. 11. (c) See  
In both cases the defendants had been convicted of a conspir-  
acy to accomplish an unlawful purpose, and had been in arrest  
of judgment that the same to be employed should have been set

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- (a) 6 Mod. 15. (1741 A.D. 1741).
- (b) 4 Mod. 11. (1741 George I - A.D. 1741).
- (c) 1 Leach Cr. L. 274. (24 George III - A.D. 1783).
- (d) 1 L. and E. 28 (24 George III - 1814).
- (e) 1 L. and A. 10. (24 George III - 1814).





out. Both actions were overruled. Lord Ellenborough, in 1801  
vs. Attorney, said that "the criminality in the act of conspiracy  
and no intention to effect that purpose, nor would have been  
complete unless it had been pursued to its consummation,  
or the parties had not been able to carry it into effect." And  
Abbott, C.J., in 1801 vs. Hill stated that "the gist of the offense  
is the conspiracy....The offense of conspiring may be complete,  
although the particular means are not settled and resolved  
on at the time of the conspiracy."

Modern practice in reference to indictments for conspiracy  
is founded upon these cases; but it was by reason of the complete  
separation between the criminality of the conspiracy and  
that of the acts done that the broad scope given the former became  
possible.

There is little discussion in the early cases as to the  
nature of the act of conspiring. It would appear that in civil  
actions of conspiracy the courts did not look beyond the mere  
fact that there had been a plurality of performers. During the  
reign of King Henry VI we find it stated for the first time (in  
argument of counsel) that the plaintiff must show that there had  
been a previous "parliament" between the defendants as to how  
the thing should be done.<sup>(a)</sup> There is some evidence that for a  
time the mere consultation in respect to doing an unlawful act  
was sufficient. Thus, in 1801 vs. Starling,<sup>(b)</sup> it is said that

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(A) H. VI, 2 Henry VI, c. 14.

(b) 1 Lev. 125.



the defendants were found guilty of "disfranchising and re-voting" to deprive the negroes. In 11 Mod. 55,<sup>(a)</sup> Lord Holt says: "If two or three persons meet together and discourse and conspire how to accuse another falsely of an offense, it is itself an overt act, and is an offense indictable." In the same case, however, Powell states the modern rule: "If people meet together to conspire, it is not a criminal conspiracy until they come to some resolution." He adds a proviso, however, apparently taken from Hagg's Case,<sup>(b)</sup> that "if it appeared and was expected, it might alter the case." This exception, however, is not considered to be valid at the present time.<sup>(c)</sup>

Almost contemporaneously with the doctrine that an unexecuted conspiracy is a crime the courts adopted the principle that the acts done are to be treated as evidence of the concerted design. Thus, in Rex vs. Warbling,<sup>(d)</sup> Twissden, J., said "if any of the particular facts, which are but evidence of the design charged, be found, it's sufficient to support an indictment". Lord Mansfield, in Rex vs. Parsons et al.,<sup>(e)</sup> instructed the jury, "that there was no occasion to prove the actual fact of conspiring, but that it might be collected from collateral circumstances." And after the complete separation for purposes of indictment between the combination and the act had taken place, this principle served to keep them in their proper relation.

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(a) 11 Mod. 55.

(b) Cause of disfranchisement of a burgess should be "an act or deed, and not a declaration or an endeavor, which he can repeat or before the commission of it, and from whence he promises money." The court also declared that the same principle applied to a conspiracy. 11 Co. 93 b, 98.

(c) See Post. p.

(d) 1 Keb. 650.

(e) R. v. Parsons, 17 Mod. 101 - 1011



There is little discussion in the early cases as to the theoretical basis of the criminalization of conspiracy. The civil liability for conspiracy was so established, upon the basis set forth by the plaintiff. This view seems to have been adopted at first in the criminal courts. In the Poulterers' Case, the reasons given for punishing the associated conspiracy are cast in the policy language of lateral crimes and injury to innocent third parties. The modern view that the criminality lies in the intent, which is declared by the sixth case, was first recognized in Rex vs. Stirling.<sup>(1)</sup> Except in these few passages, however, the judges do not attempt, until the nineteenth century, to justify the punishment of a mere agreement to commit an unlawful act. Conspiracy was considered as an "odious felony." It was a "crime of blander dye than homicide," comprehended under the denomination of crimen falsi, a conviction of which disqualified the perpetrator as a witness.<sup>(2)</sup> Hence it is probable appeared to the reader that the reasons for punishing conspiracy were too obvious to require explanation. An interesting evidence of this attitude is seen in the principle that one is liable for a single individual to do may be voluntary if done in a combination. This view, which had its origin in two Star Chamber decisions<sup>(3)</sup> of the time of Queen Elizabeth, and was accepted by some to have been laid down in Rex vs. Stirling, was received with some favor, and without discussion, during the seventeenth and eighteenth centuries.<sup>(4)</sup>

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(1) 1 Keil. 671.

(2) Rex vs. Spiddle, 1 Leach, 47; 1 L. 440 (1691).

(3) Worcester's Case, 11 Mass. 424 (1840); Lord Ship's Case, 11 Mass. 424 (1840). See note 1, p. 14.



The punishment inflicted upon those convicted of conspiracy had varied. In the civil courts, the penalty was death by the gallows, a fine to the king, and imprisonment. The criminal courts were very severe, and inflicted punishments to the "villainous degree,"<sup>(1a)</sup> which seems to indicate the origin in the common law. The last "villainous degree" of crime there is a record which passed in the reign of King Edward III.<sup>(1b)</sup>

As time went on, punishments for conspiracy became lighter. In the Star Chamber, barbarous penalties lingered longer than they did in the common law courts. We accordingly find during the reign of James I cases in which conspirators were fined whipped, pilloried, branded, or mutilated. In Miller vs. Reynolds and Balser,<sup>(1c)</sup> all of these punishments were inflicted, and Reynolds, who was an attorney, was also degraded and "cast over the common star barre."

In the court of King's Bench, fines and imprisonment were the usual punishments, though corporal punishment was sometimes inflicted. Rex vs. Driever and Cooy,<sup>(1d)</sup> is the last case recorded in which a conspirator was pilloried. The amount of the fine and imprisonment of course varied with the gravity of the offense. And in Rex vs. Priddle,<sup>(1e)</sup> a conviction of conspiracy was held to have destroyed the competency of the witness as a witness.

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(a) Lord Mansfield vs. states in Rex vs. Spragg, 1 Burr 18 (1796)

(1a) 600000000.

(1b) 4 East. 166 (1803)

(1c) 11 East. 100. 118 (1803)

(1d) 11 East. 100. 118 (1803)

(1e) 11 East. 100. 118 (1803)





3. The end of the nineteenth century law was of authority had assumed very much its present shape. Its growth, however, had been extremely unsystematic and dependent upon unusual circumstances. The task of the century is the nineteenth century, therefore, has been to develop and apply principles already suggested, to extract general doctrines from the confusion of the earlier cases, and to reduce the law to some degree of orderly and scientific arrangement. The manner in which this was attempted will be discussed in the following chapter.



## CHAPTER IV

### THE CRIMINAL LAW OF CONSPIRACY IN THE NINETEENTH CENTURY

It was laid down in Rex vs. Gill that since the combination is the gist of the offense of conspiracy, all that need be charged in an indictment is a combination for an illegal object. The overt acts performed serve merely as evidence to prove the conspiracy, and hence in accordance with the general rule, are not required to be set out.

This principle is perfectly logical, but in practice it was found to work hardship upon persons accused of conspiracy. The connection between the combination and the acts to be done is too close to allow the prosecution to keep the accused in entire ignorance up to the time of the trial of what facts he will be called upon to disprove. Accordingly the practice arose of compelling prosecuting attorneys in conspiracy cases, upon the request of the defendants, to furnish a bill of particulars giving more specific information in respect to the charges to be repelled. Just when this practice originated cannot be stated with certainty. In an anonymous case<sup>(a)</sup> decided in 1819, Abbott



U.S. refused to order a bill of particulars, saying that the gist of the indictment is the conspiracy, and that one could deduce the facts a bill was "unwarranted". But in 1880, these considerations had come to be regarded with favor. Ordering a bill of particulars in proper cases was said to be a "highly beneficial practice".<sup>(a)</sup> In Ex parte Hamilton,<sup>(b)</sup> (1880) and Ex parte Hamilton<sup>(c)</sup> (1887) the defendants claimed and were supplied with bills of particulars as a "matter of right".

The custom of granting bills of particulars, however, cannot be construed as a modification of the doctrine laid down in Rex vs. Bill. It was simply an "expedient now employed in practice"<sup>(d)</sup> to protect defendants against being put at a disadvantage by the vagueness of indictments which merely described in general terms a conspiracy "to effect an evil purpose". The prisoner was not necessarily entitled to know all the details of the case against him, such as the specific acts he was charged with having done, or the times and places at which they took place.<sup>(e)</sup> He could demand only such information as was reasonably sufficient to enable him fairly to defend himself in court; not a degree of particularism which would unduly hamper the prosecutor in the conduct of his case.<sup>(f)</sup> A bill of particulars, in short, needed only to contain such information as would appear in a special count. It would be refused, therefore, if the indict-

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(a) Rex vs. Hamilton, 7 Car. and P. 146, 411.

(b) 8 Cox C.C. 78.

(c) 8 Cox C.C. 19.

(d) Rex vs. Hewitt, D. C. M. 103 (1843).

(e) Rex vs. Hamilton et al., (1880) 7 Car. and P. 146.

(f) Rex vs. Hamilton (1887) 8 Cox C.C. 19, 71.



must contain a special count, which shall specify the offense and the special count shall give sufficient information respecting the overt acts to enable the jury to find the conviction. (a)

In this way were solved the practical difficulties caused by the lack of specific information as to overt acts in indictments for conspiracy. But other problems springing from the generality of indictments drawn subsequently to Ex. vs. Gill engaged the attention of the courts for almost forty years (1819 - 1859) after that famous decision. Guided by the principle there laid down that the conspiracy was the object, and all that need be stated, the prosecuting attorney would endeavor to tell as little about his case as the law permitted. The accused could then demand his bill of particulars. In many cases, however, he would prefer to take his chances at the trial, and then upon conviction he would have an arrest of judgment upon the ground that the indictment was defective in that it did not describe the offense with sufficient accuracy or fullness. The case of Ex. vs. Gill and Ex. vs. Leach were called in question a number of times, and the courts were compelled to

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(a) See above cases.

Even if a bill of particulars were furnished, the prosecution was not necessarily confined to the matters therein stated. "If", said Littleton, in Ex. vs. Hamilton et al., "the prosecutors give a distinct and separate notice, that they mean to go into other evidence, and the defendants at the trial object to that, and rely upon the particulars, the judge at the trial will decide whether he will receive any evidence beyond the particulars."









revived in the indictment was not essential to necessary knowledge.<sup>(a)</sup> And although the facts were based and the indictment in the indictment, it is if they were alleged as well, and the purpose of the particular intent was dependent upon them, they had to be proved as well.<sup>(a)</sup> Otherwise the defendant would not be found guilty of the particular intent. In Reg. vs. Far-  
mer et al.,<sup>(b)</sup> (1842), the ownership of goods of which the prosec-  
utor was alleged to have been defrauded by a conspiracy was  
held necessary to be shown. In Reg. vs. Kingston et al.,<sup>(c)</sup> it was also  
said that where the circumstances of the case indicated that the  
persons to be defrauded were certain and definite individuals,  
they should have been named, or reasons given why they had not  
been named. In all these instances, however, the court simply  
affirms the desire that acts and intent shall be sustained by  
evidence and identify the guilty intent which is the consti-  
tution of the offense of conspiracy.<sup>(d)</sup>

The principle that the criminality of the conspiracy is  
independent of the criminality of the overt acts following upon  
it has been logically applied, and has received some interest-  
ing illustrations in practice. Thus, in Reg. vs. King et al.<sup>(e)</sup>

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- (a) Reg. vs. Dean et al., 4 Jur., 384 (1840).  
(b) 3 Q.B. 795, 806 (1845). See also Reg. vs. Bullock, 1840.  
(c) 7 Q.B. 795, 806 (1845).  
(d) Upon a plea of autrefois acquit, however, the identity of  
the conspiracy was a matter of evidence in Reg. vs. King et al.  
(e) 7 Q.B. 795.



(1800), it was held that if the first part of an indictment alleged a complete conspiracy, the overt acts set out would not reduce it to something not indictable even though they were in themselves innocent, their only object "being to give information of the particular facts by which it is proposed to make out the conspiracy.".....Again, in Reg. vs. Ebditch <sup>(a)</sup> (1861), the attorney for the defendants accused of conspiracy to commit larceny argued that the conspiracy, being a misdemeanor, could not be the larceny, which was a felony; also, that unless this objection were sustained, they might be twice punished for the same offense. The court overruled both defenses, saying that the two offenses are "different in the eye of the law", though Section 23, thought that if the defendants should be prosecuted for larceny after a conviction of conspiracy the court should apportion the sentence with reference to the former conviction. In Reg. vs. Thompson et al. <sup>(b)</sup> (1851), it was held that a conspiracy to violate an act of Parliament was not cured by the subsequent repeal of the act. <sup>(c)</sup> The fact, also that the acts done in pursuance of a conspiracy to defraud would not result in barring the title of the party to be injured will not affect the liability of the prisoners. <sup>(d)</sup>

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(a) 3 Cox C.C. 209.

(b) 15 C.P. 638.

(c) The fact, also, that one of the accused enjoys a statutory immunity from prosecution for the whole or a part of the acts will not affect the liability of either party for the conspiracy to do them. Reg. vs. Jurgens, 43 L.J.C. 38 490 (1906).

(d) Reg. vs. Morris and Brown, 1 Q.B. 271 C.C. 207 (1864).



In Rex v. Bell <sup>(a)</sup> (1864), the jury were instructed that a conspiracy entered into at home and between foreigners to facilitate a foreign ship upon the high seas was punishable by the British courts, although they would have no jurisdiction to punish the acts done. The doctrine under discussion received its furthest extension in the recent case of Rex v. Whitechurch <sup>(b)</sup> (1901), in which the court held that a conspiracy between a woman and several others to commit an abortion upon her person was criminal although she had been mistaken in believing herself pregnant. <sup>(3)</sup>

It must be borne in mind, however, that this separation between the combination and the act done relates to the criminality of the two elements. Usually the conspiracy is closely bound up with the acts done, because it is by means of it that it is to be proved. The doctrines laid down in the cases respecting the nature of the evidence whereby conspiracy is to be proved are interesting, and have considerable light upon the conception of the offense entertained by the courts.

If in a prosecution for conspiracy the crown is able to produce a witness, not a co-conspirator, <sup>(c)</sup> who can testify directly to the fact of combination, the case is easy of proof. But, as

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(a) 4 M. and C. 66.

(b) 24 Q.B.D. 420.

(c) "So in the case of several persons indicted for burglary or conspiracy, one may be convicted on his own confession, although in terms involving the others if no legal evidence against them". (Quiter [quint] Rex v. Robinson 10 East, 1 Ex. and Tr., 302, 305.





Erle, J., well said:<sup>(a)</sup> "It does not require more than a thousand times that amount of words before we dare to say - 'I am prepared to say that when these parties had conspired together, and when they agreed to carry out their criminal purpose!'. Hence the law is very conscientious, and you and the prosecution is not obliged to prove that the persons accused actually met and laid their heads together, and after a formal consultation, came to some express agreement to do evil. On the contrary, if the facts as proved are such that the jury, 'as reasonable men (can) see there was a common design, and they (i.e. the witnesses) were acting in concert to do what is wrong, that is evidence for you to say they may suppose that a conspiracy was actually formed.'<sup>(b)</sup> In other words, the overt acts may properly be looked to as evidence of the existence of a concerted intention. "If", said Coleridge, J., to the jury in Reg. vs. Murphy et al.<sup>(c)</sup> (1837), "you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they are pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object".... To the same effect was the instruction of Erle, J., in Reg. vs. Duffield<sup>(d)</sup> (1841): "If you see several men taking several steps, all tending towards an obvious purpose, and you see them through a combination of

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(a) Reg. vs. Duffield, 10 Cox C.C. 454, 456.

(b) Reg. vs. Brown, 7 Cox C.C. 466 (1839).

(c) 3 Car. and P. 227.

(d) 10 Cox C.C. 466, 464.











being had, particularly if, after the fact of the conspiracy is once established in law, and, however it might be done or contrary of the conspirator in furtherance of the common design, it, both in law and in common sense, would be considered as being in furtherance of the common design.<sup>(a)</sup>

The reason for this doctrine is plain. When a conspiracy is once established, it is established for all purposes of law, and the fact that the conspiracy is in furtherance of the common design, and this is to be gathered from the facts alone, and acts preceding the entry of a particular person into the conspiracy are evidence to show the nature of the conspiracy, and the subsequent acts of the other members of the conspiracy toward the members of the common design in which all are presumed equally concerned. Therefore, it follows that only acts done in furtherance of the common object are admissible in evidence against co-conspirators. A declaration by one conspirator after the completion of the transaction is not evidence against the others. In U.S. v. Blake and Lee<sup>(b)</sup> (1888), the defendants had been accused of a conspiracy illegally to secure the entry of liquor without the payment of duties and so to defraud the owner of her property. It was held that the fact of showing that the quantity of goods entered was much greater than had been declared to the customs officials should be received, but was a statement in its own right that a certain amount of liquor had been the same quantity as had been declared, and that the profits of the scheme to defraud.

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(a) See also U.S. v. Blake and Lee, (1888) 2 Cr. 2d. 101.  
(b) 9 Cr. 2d. 101, 102.













of a conspiracy which binds a combination. It was held it is always called an agreement. In order to bind a conspiracy, there must be some meeting. Two parties may act together without meeting to do it." In the great case of Talbot vs. Talbot<sup>(1)</sup> (1888), Mr. Justice Miller defined the scope of Lord Hale's language as follows, "by L. the mere intention, but in the agreement, to do the forbidden act." And in Reg. vs. Smith<sup>(2)</sup> (1891), the court instructed the jury that they must "be satisfied that an agreement actually existed between Leah and Elizabeth (Thorne) to deprive the child when born. The jury must say whether the latter from Leah to Elizabeth, and two or three previous letters from Elizabeth to Leah indicated any such agreement. A mere suggestion from one to the other would not be sufficient."..

It follows as a corollary from this proposition that if several are indicted jointly for conspiracy, the acquittal of all but one operates to free him also. The verdict of "guilty" rendered against a single person would be inconsistent with the charge of a concerted design. In Reg. vs. Thompson et al.<sup>(3)</sup> (1881), the jury found that Thompson had conspired with either Tillman or Madison, but they were unable to say which one. Cresswell, J., directed a verdict of "not guilty" against Till-

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(a) L.R. 3 H. of L. 306, 316.

(b) The same idea had been expressed in Reg. vs. Pigg et al., 6 East. 418 (1805), in these words: "And it is necessary to show a criminal object as well as a criminal intent....but the offense does not consist in intent merely. It is not enough that the agreement should be for the purpose of controlling; but it must be entered into for controlling, that is, for effecting that object"..... The language employed is appropriate, and the meaning is clear enough.

(c) 12 Q.B. 333, 334.

(d) 16 Q.B. 632.



...and Maddox, and "Tillotson" and Thompson. Upon the  
trial for the trial, Lord Campbell had a majority of the Court  
of Queen's Bench were of the opinion that the verdict should be  
quashed. The indictment charged that the respondents had conspired  
to commit a crime among the three; and were if two were admitted,  
the third could not have been guilty of the crime; and so on.  
In the indictment. Erie, J., dissented, believing that the  
charge was sufficient to establish a conspiracy, and that a verdict  
that Thompson had conspired with some one, the jury did not know  
what, would have been rendered and sustained. The opinion of  
the majority in this case, however, is really not inconsistent  
with the general principle contended for by Erie. It was appli-  
cable to the facts of the verdict as a whole rendered and the  
quashed upon which it had been based. The Court, however,  
said that if there had been a conspiracy among "five or six", and  
Tillotson and Maddox had been acquitted, the matter might have  
been different: in other words, there would have been room for  
a verdict that Thompson had conspired with a person unknown.  
Erie, J., dissented and followed by Lord Campbell (a)  
(1891). The indictment was against Manning and Hanning for con-  
spiring to defraud. The jury found a verdict of guilty  
against Manning, but were unable to agree as to the others, and  
were discharged with a verdict as to Manning. A new  
trial was ordered. Manning, J., said: "The rule appears to be  
that in a case for conspiracy it is not sufficient to show

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(a) 10 Q.B. 241, 242.





the defendant, the issue is raised whether or not the jury was misled, and if the jury are not satisfied as to the guilt of either, then both must be acquitted." (a)

If, however, a verdict of guilty against a single defendant does not amount to a "label of irreversibility" or stigma of irreparable damage upon its face, the verdict will stand. In Reg. vs. Cooke (3) (1886), several were indicted for a conspiracy. Two pleaded not guilty, one never appeared, one pleaded in abatement. While the plea in abatement was pending, the trial began for who had pleaded not guilty last time. One of those not admitted, and the other found guilty of conspiracy with the defendant who had pleaded in abatement, and who had not yet been tried upon the merits of the case. The court refused even to stay judgment until the latter defendant could be tried. "We are not warranted in presuming that the other defendant in this case will be acquitted." (b) Littlejohn, J., however, remarked, "If the other defendant J.D. Cooke shall be hereafter acquitted, perhaps the judgment may be reversed". Very similar was Reg. vs. Alcock (4) in which one of several defendants accused of conspiracy to murder was tried alone, for a guilty, and sentenced to death. The court refused to stay judgment, although it was argued that the

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(a) The farthest extension of the general principle under discussion is shown in Rex vs. Plummer, 71 L.J.N.S. 805 (1902). The three defendants had been indicted for murder, but were later found guilty of false pretences, and for conspiracy to murder. Plummer pleaded "guilty" to the charge of conspiracy, "not guilty" to the rest. The other two defendants were afterwards acquitted upon the whole indictment. The court held that the conviction of Plummer must be quashed, since justice was inconsistent with the verdict.

(b) Reg. vs. Quigg, 19 Cox C.C. 78 (1898).

(c) Reg. vs. ...

(d) Reg. vs. ...

(e) 6 Cox C.C. 6.



other prisoners might be admitted; PROSECUTOR: THE DEFENDERS OF  
STEWARTS WOULD FOLLOW BY NECESSARY INFERENCES. LEACH, J., SAID:  
"THE PRISONERS OFFERED WERE BY THE DEFENDERS' EVIDENCE TO BE  
GRANTED FOR REPEATED CONSPIRACY, AND CERTAINLY NOT FOR REPEATING  
ARRESTING JUDGES AT."

Conspiracy, then, is an agreement. The parties must unite  
in a common intention. But there must be something more. Mere  
agreement is not in itself a crime, although the principles ap-  
plied by the Court of Star Chamber and perhaps by the earlier  
Courts of King's Bench may have found elsewhere. The addition-  
al element of intention to effect a forbidden purpose is nec-  
essary to constitute the offense of conspiracy.<sup>(a)</sup> Hence, a per-  
son accused of conspiracy may offer in evidence letters showing  
that although he had participated in the unlawful scheme, he had  
been the dupes of the other defendants, and had been taken without  
privity in the concerted illegal intention to do wrong.<sup>(b)</sup> It has  
been expressly laid down in reference to indictments for con-  
spiracy to defraud the public by issuing a false prospectus re-  
specting shares in a corporation of stock,<sup>(c)</sup> and to defraud the  
public, the shareholders and the customers of a bank by publish-  
ing false balance-sheets and other representations regarding the

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(a) Reg. vs. Barry, 1 B. & F. 302 (1801), 120, (1801), Reg.  
vs. Russell, 14 Cox. 111 (1841). Reg. vs. W. & A. 111, 1 B. & F.  
48, (1870).

(b) In Reg. vs. Poole & al., 1 B. & F. 125 (1801), Lord  
Ellenborough said: "You must prove that all the defendants were  
conscious of the guilt of the conspiracy, or the conspiracy was  
in the indictment by which it was to be carried into effect. A  
contrary doctrine would be extremely dangerous."

(c) Reg. vs. Wood, 5 Cox. 111 (1870).













We need not run the question, how far the acts of two persons joined toward a common end are to be treated as a single act, or whether, since the intention is common, it is the act of the combination, and is the act of the person. The purpose of the law renders illegal a combination to effect it?

Here lies the crux of modern discussion concerning the subject of conspiracy. Shortly stated, the problem before the courts is to frame a general definition of conspiracy broad enough to include all criminal combinations, and at the same time sufficiently definite and consistent to enable the judges to apply the law with precision in the manifold conspiracy cases which find their way into the courts.

This problem did not begin to exercise the courts until the nineteenth century. The growth of the law of conspiracy during the three centuries preceding had been guided by few general principles. The conception of the offense was freely expanded to take in new combinations which were more than deserving of punishment, with little discussion or reference to any fixed standard.<sup>(\*)</sup> Of course partial groupings of the cases had taken place. Thus, a number of more or less heterogeneous combinations were comprised under the general captions of conspiracy to injure the public,<sup>(\*)</sup> conspiracy to cheat, and the like. But no particular attempt had been made to extract from the multitudinous cases any general principle which should serve as a reliable test to distinguish criminal conspiracies from other combinations. Not until the nineteenth century had pointed out the instinctive antipathy of former times toward combinat-



long, but manifest the capacity<sup>(a)</sup> to do otherwise. In the extreme plasticity of the class of conspiracy, this is necessary for and a test only itself fails. In the meantime, however, the principle that the conspiracy is the crime had become firmly established, and the variety of the cases has only demonstrated that the generalization possesses wide limits.

The classic judicial definition of criminal conspiracy is a proposition altered by Lord Denman in Rex vs. Jones<sup>(b)</sup> (1849). Several persons had been indicted for a conspiracy to conceal and abscond the personal estate of Jones, for the purpose of cheating his creditors. Upon conviction, the defendants made a motion in arrest of judgment, objecting that the indictment did not disclose beyond a doubt that Jones had been legally declared a bankrupt. Lord Denman said: "...The indictment counts to charge a conspiracy, either to defraud Jones, or to conceal and abscond his goods. Here the indictment charges a conspiracy to rescue and conceal the goods of Jones; but if the commission was bad, Jones had a right to rescue them.... There is nothing stated on the face of this indictment as to constitute an offence."

Now it is clearly evident that the above definition was intended to limit the offence of conspiracy, not to define it. The court simply meant that the object of every criminal conspiracy must be unlawful, not necessarily that every combination for an unlawful object is criminal. Lord Denman himself said in a later case,<sup>(c)</sup> in answer to a question by counsel of the unlikelihood: "The words 'at least' should accompany that." In Rex vs. De-

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(a) Observe the language of Lord Ellborough in Rex vs. Turner, 11 Q.B. 187, 204 (1848).

(b) 13 Q.B. 348, 12.

(c) Rex vs. Turner, 7 Q.B. 181, 182 (1848).



1814 (1814), the House voted upon the proposition to amend the  
article: "No indictment for a conspiracy shall be returned until  
it charge that a conspiracy conspired to do an unlawful act,  
or to do a lawful act in an unlawful manner; and if any member of  
such conspiracy die." And in Reg. v. Ash (1859) the judge  
said: "I do not think the authorities very correct." But  
the next year it is again in the later decisions of the House  
very similar illustrations of <sup>the</sup> conspiracy, and finally in 1859  
which the law of conspiracy was developed. In Reg. v. Turner  
et al. (1859), Alderson, J., employed Lord Denham's analysis  
for the first time as a definition, saying that some "law" is  
a crime which consists either in a combination and agreement by  
persons to do some illegal act, or a combination and agreement  
to effect a legal purpose by illegal means." And in spite of  
its author's dissatisfaction with it, this definition has been  
treated as a definition ever since. It must be noted as the  
very foundation of the modern law of conspiracy. It has been  
used, always with approval and without exception or criticism,  
in a long line of decisions of the House of Lords (1859) until  
it has become firmly established in the national jurisprudence.

A considerable portion of the progress made by the law of  
conspiracy during the past twenty-five years has taken the form  
of explicit definition from Lord Denham's analysis. The

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(1) 1 C. and P. 187, 181.

(2) 9 A. and E. 48, 190.

(3) 9 C. and P. 91, 109.



consider "the" definition and meaning of the words "unlawful act" and "indictable crime." The manner of the delivery during the witness's testimony is largely responsible for the broad scope characteristic of the common conception of "indictable conspiracy." The earlier case has settled little more than that concerted enterprises directed towards the public, and composed of individuals in false charges, are punishable as indictable.

It is obvious that an indictable offense is an "unlawful act". Conspicuous to common views, of statutory or of common law origin, therefore, clearly fall within Lord Denning's definition. This principle was laid down expressly by Lord, J., in Reg. vs. Howell<sup>(a)</sup> (1801), overruling Reg. vs. Broom: "An agreement to commit an indictable offense undoubtedly amounts to a conspiracy." A large number of the conspiracies which decided during the nineteenth century were of this character: among them numerous conspiracies to cheat wherein the means employed would have rendered an individual guilty of the crime of obtaining money under false pretences.<sup>(7)</sup>

But the courts have also held "unlawful" include any acts which would not have been criminal if performed by a single person. Thus, they held that a conspiracy to induce a girl to become a common prostitute was an indictable conspiracy, as being contrary to the "public morals" and "public policy".<sup>(8)</sup>

(a) 2 Wm. W. & A. 1, 100.

(b) Reg. vs. Howell et al., 4 T. and F. 160. (1804). See also Reg. vs. Broom, 1 Wm. W. & A. 1, 100 (1801).





It has occasionally been considered in several cases, and finally generalized in Reg. v. Taffell <sup>(4)</sup> (1881) and later cases down to Reg. v. Bell <sup>(5)</sup> (1896) that an agreement to do (or attempt to do) an act which would be a crime, or to a private wrong if performed by a single person is a criminal conspiracy, being "illegal" within the meaning of the definition. <sup>(6)</sup> Again, a great variety of combinations to cheat and defraud - by far the largest class of combinations at the present time - was brought within the conception of conspiracy, although the deception employed was not of such a character as would render a single person guilty of the crime of obtaining money under false pretences. <sup>(7)</sup> All these were held to be combinations for "illegal" purposes. A good statement of the modern law upon the subject is found in Reg. v. Aspinall <sup>(8)</sup> (1876). Erie, M., said: "It is not, of course, every agreement which is a criminal conspiracy. It is difficult, perhaps, to enunciate an exhaustive or a complete definition; but agreements may be described which are undoubtedly criminal. An agreement to accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy. An agreement to accomplish, by means which are in themselves forbidden by law, an end which is harmless if accomplished by unforbidden means, is a criminal conspiracy. An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right which is founded on fraud, or some violation recognized as such towards him is a criminal conspiracy: see Reg. v. Riddell. There may be and probably are others."

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(4) 1 Q.B. 361. 104  
(5) 10 Q.B. 361. 104.  
(6) 1 Q.B. 361. 104.



There seems to be no doubt at the present time that the above described combinations are criminal combinations. Now the question arises, are there any cases in which a combination whose object, whether proximate or remote, is not "illegal" in the sense above intimated, has been authoritatively declared to be criminal?

This question has been raised frequently in connection with combinations in furtherance of industrial disputes. There will be discussed in detail in the following chapter. It may be said generally, however, that every combination held to be a criminal conspiracy during the nineteenth century had for its object, either proximate or remote, something which was clearly illegal. In a few cases, it is doubtful whether the acts contemplated were unlawful in the sense of criminal or even tortious. Thus, in Reg. v. North<sup>(a)</sup> (1825) the defendants were convicted of conspiracy by false oath and false references to cause a marriage between an infant and a prostitute, with the intent thereby to injure her, deprive her of her property, and ruin and ruin public morals. Also, in Levi v. Levi<sup>(b)</sup> (1813), Barker, J., said obiter that a combination among brokers to refrain from bidding against one another at an auction sale and afterwards to share the profits arising from the low selling prices thereby induced, would be an indictable conspiracy. Again, in Reg. v. Bell<sup>(c)</sup> (1827), Abbott

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- (a) 1 R. and M. 325.
- (b) 1 Car. and P. 517.
- (c) 2 Car. and P. 521.



C.J. introduced the jury that a combination to restrain trade is a conspiracy to restrain trade and is indictable in England and in this country. (10) There are other cases of the same kind. (11) But in all of them, either the object aimed at or the means employed were certainly "illegal" in the sense of dishonest, fraudulent, against public policy, or the like. Often the acts could have been avoided by the agents in proper cases, though the motive was to do something under the particular circumstances shown.

Understanding its terms in a wide sense, therefore, we may accept Lord Bowen's antithesis as a comprehensive definition of the offense of conspiracy in Boardman v. Dwyer (1934) 100.

There is some apparent confusion and contradiction in the nineteenth century cases as to the status of combinations to effect an admittedly illegal purpose by the use of legal means. See ibid.

As we have seen, it was declared during the eighteenth century that such combinations were indictable, no matter whether the means to be employed were legal or not. There are also cases in the nineteenth century in which this principle was affirmed. In Reg. v. Hollingshead (a) (1835), two prisoners were convicted of a conspiracy to extract money from the prosecution by inducing the jury to convict a young woman, although the jury found specifically that the charge was true. Abbott held that

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(a) 100 E.R. 1023, 142.



This latter circumstance is immaterial, because the question was whether they converted them (the goods) illegally, with an illegal intent and for an illegal purpose, and the jury, after full consideration, have found that they did." This ruling was later announced in Reg. vs. Taylor <sup>(a)</sup> (1847). Likewise in Reg. vs. Hall <sup>(b)</sup> (1848), a conspiracy among farmers to dispose of their goods in contemplation of bankruptcy, with intent thereby to defraud their creditors, was held to be indictable. And in Reg. vs. Taylor and Boyce <sup>(c)</sup> (1843), it was decided that a combination to sue for and collect a debt or money to which the defendants knew they were not entitled, was a criminal conspiracy. Lord Coleridge said "that a legal proceeding, regular and not fraudulent, or a step taken or means used in the prosecution of a fraudulent scheme." This direction was approved by the entire court upon motion for a new trial. As Mather, J., put it, "The broad question was this - whether these two defendants laid their heads together to obtain a judgment for thirty pounds, very little or much, or if not law, who law."

In addition to these specific cases, the books contain a number of general statements confirming the doctrine that the legality vis-à-vis of the means employed is immaterial at the inception of a conspiracy. In Reg. vs. Taylor <sup>(d)</sup> (1845), Lord Denning said: "It was argued that the overt act in the allegation in the first part of the indictment, and that when it has become a criminal conspiracy, the statements afterwards made as to

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- (a) 1200 L.C. 173.
- (b) 1 Q. B. 33.
- (c) 10 Q. B. 34.
- (d) 9 Q. B. 745.





something and illegality. But I think that result is not follow, even if the overt acts alleged are I suppose the only objects of these acts. To give a definition of the particular crime in which it is charged to have been the conspiracy, and the more in which the prosecutor insists that it was carried into effect. The same view appears in the opinion of Brett, J., in Reg. v. Ashwell<sup>(a)</sup> (1876). In stating Lord Bowen's definition of conspiracy, he says in terms: "An agreement to accomplish an act forbidden by law, though by means which would be lawful if used to accomplish that forbidden act, is a criminal conspiracy."

Some apparent doubt was cast upon this doctrine by the cases of Reg. v. Bann<sup>(b)</sup> (1834) and Reg. v. Taylor and Smith<sup>(c)</sup> (1871). In the latter case there had been a conspiracy among several parish officers to procure a marriage (by a promise to secure the marriage license, pay the expenses of the marriage, and give the husband three pounds) between a male pauper and a female pauper with child of a bastard, for the purpose of removing the burden of the woman's maintenance upon the husband's parish. The Court of King's Bench unanimously held that such combination was not indictable. The majority of the judges based their decision upon the ground that the purpose of the transaction (i.e. to charge the other parish) was not illegal, provided no unlawful means were used. Hence, the question as to a

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(a) 1 Q.B. 48, 49.  
(b) 1 M. and W. 17.  
(c) 12 L.R. 2. 38.



conspiracy is accomplished a wrongful purpose by unlawful means has not really before the court. But in answer to an argument by the prosecution that conspiracy to do a lawful act for the purpose of injuring another is indictable, Littleale, J., said: "If parties conspire to do an unlawful act, or a lawful act by unlawful means, this is a conspiracy, for which they may be indicted; but that is not so where the parties conspire to do a lawful act, for the purpose of injuring another." The prosecution then urged that the gist of the offense was not "a conspiracy to procure a barrier between paupers, but for conspiring unlawfully to remove a burden from their own parish, and unlawfully to charge the other parish"; that this was an indictable offense, therefore the means employed need not be stated. But Hoffman, J.J., answered: "But when overt acts are stated, some of them must be unlawful."

The idea apparently in Lord Hoffman's mind seems to have been clearly expressed in Reg. v. Taylor and Smith.<sup>(a)</sup> There was an indictment for conspiracy to commit larceny. The evidence offered at the trial showed "that the prisoners and another were seated on a door step; that when a well-dressed man or woman went into the crowd, one of the prisoners nudged the others, whereupon two of them rose and followed that person. In the case of a man, they lifted his coat-tail, as if to ascertain if there was anything in his pocket; but they did not attempt to insert a hand in the pocket. In the case of a woman, they went

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(a) 25 L.T.N.S. 75 (1871).



and stood by one side, and tried to make it the primary was seen to be against her side, but their not being attempted to be thrust in her pocket, for they had no legal side of those persons of any such kind." The Court, held that there was not sufficient evidence of conspiracy or otherwise. "It appears to me to be impossible to say that the doing of an act not illegal is evidence of a conspiracy, as is an illegal act, there being no other evidence of conspiracy than the act so done". Accordingly, a verdict of not guilty was returned under the instruction of the court.

It would seem that the doctrine that a combination to effect an admittedly illegal purpose by means not illegal per se is an indictable conspiracy is sound both upon reason and authority. It is limited, however, by the Taylor Case, to this extent: a conspiracy to accomplish an illegal purpose cannot be proved by a series of legal acts. This limitation goes, not to the essence of the offense, but to the evidence by which it is to be made out. An indictment, consequently, which charges a conspiracy to effectuate an unlawful purpose, would not be vitiated by the fact that the overt acts set out are not illegal per se. This follows from the principle laid down in Ham v. Gill that the means to be employed are no part of the charge of conspiracy, latter resting wholly upon the combination for an unlawful object. The overt acts alleged might be rejected as surplusage and leave the charge itself untouched. Of course, if the acts described showed conclusively that the intent imputed to the conspirators had not in reality been entertained by them, the indictment would fail; but the same practice would be followed in respect to indictments for any other offense. Ordinarily, an indictment charging a conspiracy to effectuate an



object of Lex vs. Smith would be sustained upon demurrer, but at the trial the prosecutor should be required to adduce other evidence of the unlawful purpose than the using of perfectly legal acts. The point becomes clear when we compare Lex vs. Taylor and Smith with Lex vs. Taylor and George. In the former case, there was no evidence of the illegal combination beyond the acts mentioned above. In the latter, there was the additional circumstance that the debt sued for had already been paid to the prisoners, and hence their subsequent resort to the action at law to collect it could only have been for the purpose of defrauding the prosecutor of her money.

It is interesting to note that in only two cases decided during the nineteenth century did the courts attempt to give any reason why a mere agreement should be punished as a crime. In both, the formidable character of the combination is cited as the justification. Thus, in Reg. vs. Duffield<sup>(9)</sup> (1841) Erle, J., said: "It is most obvious, in a word, that if persons, intending to break the law, are compelled to act single-handed, those on the side of the law part of the community can very well oppose them, and for the most part keep them under, but if those who are determined to break the law combine to support together for that illegal purpose, they are a much more formidable enemy, and the law has said that combination for an illegal purpose is an indictable offence". To the same effect is the statement of Fitzgerald, J., in his charge to the jury in Reg. vs. Farrell<sup>(10)</sup> (1841): "The agreement to commit an injury or wrong to another or to two or more persons is constituted an offence because the wrong to be effected by a combination renders a more

(9) 4 Cox C.C. 325, 432.

(10) 11 Cox C.C. 325, 432.





isolated occurrence". From this view, the distinction suggested in Reg. vs. Farnham<sup>(a)</sup> (1883) as to punishing conspiracies as criminal conspiracies is logically fallacious. The court said: "Should there also have appeared now for an indictment for conspiracy to be maintained, where the object of it was of a trivial nature, or where the whole matter might be thought to sound in damage, not in crime?"<sup>(12)</sup>

There are several indications in the cases that the law regarded conspiracy as a more or less shadowy offense. Thus, in Reg. vs. Tibbert<sup>(b)</sup> (1870), Cleary, J., said: "I. (conspiracy) differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself until something is done amounting to the doing or attempting to do some act to carry out that intention." This remark, however, bears a "misconception of the nature of the offense. It was brought out very clearly in the argument of counsel in Mulcahy vs. Reg.<sup>(c)</sup> that a conspiracy involves "some outward act distinct from the mere operation of the mind of one person. Two persons cannot conspire and agree without some communication, either by word or in writing." That is, the crime consists, not in the mere intention, but in the agreement to do treason. Hence, therefore, "their agreement is an act in advancement of the intention which each of them has conceived in his mind," is now held to be an overt act sufficient to support a conviction for treason.<sup>(d)</sup> In this particular, there seems to be no generic difference between criminal conspiracy and criminal attempt.

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(a) D. and M. 208, 216.

(b) 208 D. & M. 498 (1870).

(c) 11 F. & R. 1 (1870).

(d) 11 F. & R. 1 (1870).



The principle that an agreement to do an act not in itself a crime is a justifiable offence has several times been applied by counsel during the nineteenth century, but without success. The only case in which a court expressed any dissatisfaction with this principle was Reg. vs. Ashburn<sup>(a)</sup> (1875). Lordhorn, C.J., there said: "There may be a doubt whether the law of England is consistent in saying that what is not criminal in one man alone is criminal when done by two men. This, however, is not a case in which it is desirable to put any restriction on the rules of law relating to conspiracy." In other cases in which the point was raised, the courts were not content with laying down as a matter of "common law" that what can be done by one man with impunity may render a combination to do it guilty of conspiracy.

The consciousness of the anomalous character of conspiracy appears very plainly in the case of Reg. vs. Bell<sup>(b)</sup> (1847). Colfe, J., (afterwards Lord Cranworth) remarks upon the fact that the defendants were indicted, not for the acts done, but for a conspiracy to do them, "the having done which is the proof of the conspiracy. It is never satisfactory, although undoubtedly it is legal."

At the present time, the crime of conspiracy as defined by the law of England consists in the bare agreement to do something illegal. Any such agreement may be punished; but the courts, in passing upon specific cases, will determine whether

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(a) 11 Cox C.C. 584, 587.  
(b) 5 Cox C.C. 495 (note).



the particular unfair combinations are serious enough in their consequences to merit criminal penalties. Conversely, it is very improbable that the judges will hold criminal any combination which purports to commit only legal acts, however oppressive to individuals such as the *et. al.* case in the civil courts, in which such combinations have been most discovered, the general principle seems still to remain sound that the fact of combination will not transform an otherwise legal undertaking into an actionable wrong.<sup>(a)</sup> The only exception has reference to certain combinations among workmen, which will be treated in the following chapter.

It would be interesting to inquire in detail as to how far the practice of punishing bare agreements to do evil can be justified upon sound principles of jurisprudence. It cannot deny that the English law relating to criminal conspiracy is unique. Being largely the creature of special circumstances, it has no parallel in the legal systems of France, Germany, and other continental countries in which the conditions under which it originated and grew were not duplicated. We may say generally, however, that the offense of conspiracy does not in reality constitute an exception to the fundamental principle that the law will not take cognizance of a bare intent to do evil. But whenever the law punishes criminal acts, it can and does examine into the intent of the actor. In all crimes, the intent is at least as important as the act itself, in some, it may

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(a) *Keirsey vs. Mayo* 22 L.R.Q.B. 226; *Wentley vs. Green*, 111 N.D. 117 (1900) 2 L.R. Q.B.



were important. Thus, in the case of a criminal offense, the element of criminal intent is the cardinal point. The nature and consequences of the act done are merely incidental. It appears, therefore, that in some cases of all events the law will punish no intent, provided it is manifest, and is an act done to accomplish it. The leading courts have given open expression to this principle in discussing the crime of treason. Upon the same principle we can justify the punishment of criminal conspiracy. The latter, as we have shown, consists in a criminal intent manifested by the act of agreement. It differs from criminal attempt only in respect to the nature of the act in which the intent appears.

There is some difference of opinion as to whether the English law of conspiracy has received too wide an extension. This, however, is a subject with which we need not at present concern ourselves. It will be sufficient to say, that, upon the whole, the principles relating to illegal combinations play a useful part in the administration of criminal justice. Through them the law is enabled to reach a number of wrongful enterprises which would otherwise be immune from punishment. The criminal liability thus created can well operate as a safeguard upon the pernicious activities of that considerable class of citizens who feel no scruple against forming a plan and carrying it into effect for the purpose of obtaining an undue advantage or of securing the relief of fraud or oppression and isolation. All such are and themselves indictable offenses.





## CHAPTER V

### COMBINATIONS OF LABOR

During the 19th century, the law relating to criminal conspiracy has affected combinations of labor much less in England than it has upon this side of the Atlantic. Our English brethren have preferred to deal with this important subject by means of carefully drawn statutory enactments, whereas in America the problems growing out of the conflict between capital and labor have been thrown largely upon the courts for solution. In late years, Parliamentary labor legislation has been directed against specific acts, rather than against combinations to act. In years gone by, however, the element of combination occupied a prominent place in the field of labor law; and an account of its vicissitudes forms an interesting and instructive chapter in the history of our subject.



The labor problem began to engage the attention of Parliament at an early period. The first Statute of Laborers was passed in A.D.1349(28 Ed.3), and was aimed against the rise of wages consequent upon the Black Death. It provided that all unemployed able-bodied persons within the age of 60 years might be compelled "to serve him which so s all him require," upon pain of imprisonment. They were to take no more than the customary wages, and were not to depart from service before the end of the period agreed upon. By a second act passed in the following year(25 Ed.3,Stat.1-A.D.1350) the wages to be paid to the different classes of laborers were specifically prescribed, and strict provision was made for the enforcement of the law.

The policy of state regulation of labor so inaugurated was continued and extended by a number of acts subsequently passed. Attempts were made to regulate the conditions of labor in great detail. Laborers were permitted to "use but one mystery".<sup>(a)</sup> They were restricted to the hundred in which they resided, and after they had reached the age of 12 years they<sup>(b)</sup> were compelled to follow the trade of their fathers. Upon leaving employment, they were required to obtain testimonials, and other persons were forbidden to employ any workman who had not such a testimonial. The hours of labor, the dress which laborers should wear, the arms they might carry, the games they might indulge in, even the time to be allowed them for meals-<sup>(c)</sup>

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(a) 36 Ed.3,(1362); 34 Edward III (1360).

(b) 12 Edward III(1338)-Restriction as to place removed by 2 and 3 Edward VI, C.15, sec.4(1548).

(c) 12 Ricard III(1388); 6 Henry VIII, C.3(1514); 4 Henry IV 4(1402).



all these matters claimed the attention of Parliament, and the justices of the peace were directed rigidly to enforce the laws.<sup>(a)</sup> In 1389(13 E.2), statutory regulation of wages was replaced by a policy of allowing them to be prescribed at Easter and Michaelmas by a justice of the peace. This policy was continued by Stat.6 Henry VI, C.3(1437), directing that wages be fixed by justices at quarter sessions, and in the towns by the mayor and the bailiffs, "because masters could not get servants without giving higher wages than allowed by the statute." Direct statutory regulation of wages was tried again in 1514(Stat.6 HenryVIII, D.3), but was finally abandoned in 1562, when the great Statute of Laborers, Act 5 Elizabeth C.4, was passed.

This famous act was a consolidation of previous labor laws. Most of the provisions of the foregoing statutes were retained and elaborated. Wages were to be fixed and revised from time to time by justices of the peace, and the giving or taking of more than the prescribed rate was made punishable. A new feature was a careful regulation of apprenticeship.

The Act of 5 Elizabeth marks the highest point attained by state regulation of labor in England. It gradually became a dead letter, but was not finally repealed until 1875. "Throughout the whole of the 17th, and the greater part of the 18th century," says Sir James Stephen, "No act was passed for the general regulation of trade and labor in any degree comparable in importance to the 5 Elizabeth, C.4."<sup>(b)</sup>

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(a) 2 Henry V, C.4(1411).

(b) "History of the Criminal Law of England", Vol.3,p.205.



The laborers themselves, however, were not pleased with this strict policy of regulation. The attempts made by them to advance their own interests in spite of the law soon developed organization, and this it was that brought the element of combination among workmen to the attention of the law-makers. Such organizations began to grow up almost immediately after the first Statute of Laborers (3 Ed.3-4. 1349). Eleven years after its passage, Parliament mildly declared void all alliances and covins between masons, carpenters, and guilds, chapters and ordinances. The ineffective character of this prohibition, and the strength of the resistance engendered by the labor laws of the reigns of Edward III, Richard II, Henry IV and Henry V are evidenced by the peremptory terms of the Statute 3 Henry VI, C.1(1424). Reciting that "by the annual congregations and confederacies made by the masons in their general chapters assembled the good course and effect of the statute of laborers are publicly violated and destroyed in subversion of the law," the act commanded "that such chapters and congregations be not henceforth held", under severe penalties.

The growth and increased efficiency of the rudimentary combinations of labor which sprang up during the following century and a quarter find an eloquent testimonial in the next act upon the subject, "The Bill of Conspiracies of Victuallers and Craftsmen," Stat.2 and 3 Edward VI, C.15(1548). This statute enacted that "if any artificers, workmen or laborers do conspire, covenant or promise together, or make any oathe, that they shall not take or do their works but at a certain price or rate, or shall not enterprize, or take upon them to finish that





another hath begun, or shall not do but a certain work in a day, or shall not work but at certain hours and times; that then every person so conspiring, covenanting, swearing or affecting" shall suffer a fine of 10 pounds or 30 days imprisonment for the first offense, and a severer punishment for subsequent offenses. Moreover, section 2 provided that such a conspiracy entered into by a majority of any society, brotherhood or company of such persons should work an instant dissolution of their charter, besides subjecting them individually to the above penalties.

The Elizabethan Statute of Laborers(5 Elizabeth, C.4-A.E.1562) said nothing about combinations of labor. The law was silent upon this subject until the year 1720. when the first of notable 18th century statutes against combinations among laborers was passed.

This act(7 George 1, Stat. 1, C.13) was directed against combinations among journeymen tailors. It enacted"that all contracts, covenants and agreements.... made or entered into... by or between any persons brought up in or professing, using or exercising the art or mystery of a taylor, or journeyman taylor... shall be and are hereby declared to be illegal, null and void to all intents and purposes;" and any one convicted before two justices of the peace of remaining in such combinations after May 1, 1721, might be committed to the House of Correction or to the common goal for not more than two months.

Four years later(12 George 1, C.34(A.E.1724) a statute entitled "an Act to prevent unlawful combinations of workmen employed in the woollen manufactures, and for better payment of



their wages," similarly provided that contracts and agreements, by-laws and ordinances made and entered into by such workmen for regulating the prices of their goods, or raising their wages, or shortening their hours of labor should be "illegal null and void to all intents and purposes." Those who entered into or remained in such combinations after June 24, 1726, might be summarily punished as described in the Stat. 7 George 1. Subsequent acts made like provision against combinations of workmen in other specified trades. The statute 22 George 11, C.27, sec. 12(A.D.1749) extended the operation of the 17 George 1, after June 24, 1749, to journeymen dyers, hot-pressers, and others engaged in the manufacture of woollens: also to all workmen employed in the making of felts and hats, and in the fur, iron, leather, mohair, fustian, and various textile manufactures. In 1777(17 George 111, C.55)an act was passed more especially directed against the organization and meeting of societies and clubs of persons working at the manufacture of hats. By the Statute 36, George 111,C.111(1796), provisions similar to the foregoing series were extended to workmen employed in the paper trade.

The culmination of the anti-combination laws took place in the Acts of 39 and 40 George 111(1799, 1800), which contained general enactments similar to the specific prohibitions in previous acts. These famous statutes represented the highest point ever reached by repressive labor legislation in England.

Reciting the prevalence of unlawful combinations among workmen, and the ineffectiveness of former laws to suppress them, the Act 39 George 111,C.81 enacted "that from and after



the passing of this act all contracts, covenants and agreements whatsoever... heretofore made or entered into between any journeyman manufacturers or other workmen, or other persons within this kingdom, for obtaining an advance of wages of them, or any of them, or any other journeyman manufacturers or workmen, or other persons in any manufacture, trade, or business, or for lessening or altering their or any of their usual hours or time of working, or for decreasing the quantity of work, or for preventing or hindering any person or persons from employing whomever he, she, or they shall think proper to employ in his, her, or their manufacture, trade or business, or for controlling or any way affecting any person or persons carrying on any manufacture, trade, or business, in the conduct or management thereof, shall be, and the same are hereby declared to be illegal, null, and void to all intents and purposes whatsoever."

Sec. 2 provided further that "no journeyman, workman, or other persons" at any time after the passage of this act should enter into, "or be concerned in the making of or entering into" of such illegal contract, covenant or agreement; and "every journeyman, workman, or other person, who, after the passing, shall be guilty of any of the said offenses," being convicted in a summary proceeding before justices of the peace, should be imprisoned in the common goal for not more than three months, or in a House of Correction at hard labor for not more than two months.

Sec. 3 imposed the same penalty upon "every workman who shall at any time after the passing of this act, enter into any



combination to obtain an advance of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or for any other purpose contrary to this act." The other offenses similarly punished were certain acts done by individuals; which were made criminal without regard to the element of combination. Secs. 4 and 5 were more particularly aimed at trade unions. "For the more effectual suppression of all combinations among journeymen" (and other workmen); Sec.4 denounced the same punishment against persons who might attend, or in any way endeavor to induce any workman to attend, any meeting held for the purpose of forming or maintaining any agreement or combination for any purpose declared illegal by this act, or who might endeavor in any manner to induce any workman to enter into or be concerned in any such combination; also against those who should collect or receive money from workmen for any of the aforesaid purposes, or who should pay or subscribe money toward the support or encouragement of any such illegal meeting or combination. Sec. 5 imposed a penalty of 5 pounds or imprisonment upon any person who might contribute toward paying the expenses incurred by any persons acting contrary to the statute, or toward the support or maintenance of any workman for the purpose of inducing him to refuse to work or be employed. By section 6, money already contributed for any purpose forbidden by the act, unless divided within three months after its passage, was declared forfeited.

The remainder of the act (Sec.7-17) prescribed in detail the manner of its execution, and granted supplementary powers essential thereto.





In the following year(1800), it was found"expedient to explain and amend" the foregoing act, and accordingly the Act of 39 and 40 George III, C.106 was passed for this purpose. The later act repealed the former, and substituted other provisions in its place. The first sixteen sections of the new act, however, were identical with the corresponding sections of the old, except for a few minor improvements, chiefly verbal. But the new act introduced two novel features. Sec. 17 declared that all contracts and agreements between "masters or other persons, for reducing the wages of workmen, or for adding to or altering the usual hours or time of working, or for increasing the quantity of work," should be illegal and void; and any person convicted in a summary proceeding before any two justices of the peace of entering into such an agreement should forfeit 20 pounds, or be imprisoned in the goal or the House of Correction for not less than two nor more than three months. Secs. 18-23 provided an elaborate system for the compulsory arbitration of trade disputes.

The net result of the above two statutes( in so far as they concern our present purpose) was to render illegal and criminal any and every combination among masters or workmen to fix the wages or alter the conditions of labor.

The Anti-Combination Acts of George III were passed during the period of the dominance of Old Toryism. But even at that time the new school of Individualism was issuing its challenge to the reactionary and oppressive doctrines of the older school. The manner in which the teachings of Bentham and his disciples gained the ascendancy need not be detailed here. It will be



sufficient for us to note that just twenty-five years after the Acts of 39 and 40 George III, the entire legislative policy of England toward combinations of labor was fundamentally transformed. This change was brought about by two Acts: 5 George IV, C.95(1814), and 6 George IV, C.129(1815).<sup>(a)</sup>

The first of these statutes began with a long section repealing, specifically and generally, all former "laws, statutes and enactments now in force throughout or in any part of Great Britain and Ireland" relative to combinations of workmen "for the purposes therein specified. It then enacted (Sec. 2), "That journeymen, workmen, or other persons who shall enter into any combination to obtain an advance, or to fix the rate of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or term for which he is hired, or to quit or return his work before the same shall be finished, or not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof, shall not therefore be subject or liable to any indictment or prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or statute law." By section 3, masters entering into combinations for the opposite purposes were exempted from punishment to a like extent.

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(a) "To the desire to extend contractual freedom belongs the reform in the Combination Law, effected under the direct influence of the Benthamite school in accordance with the principles of individualism by means of the two Combination Acts of 1814-1825." Dicey, "Law and Opinion in England," p.120.



Regulation was put upon laboring men and others by means of the prohibition of certain specified acts, whether performed by an individual or by a combination. Sec. 5 provided that "if any person by violence to the person or property, by threats or by intimidation shall wilfully or maliciously force another" to cease working or not to accept employment, or should employ the above methods toward another on account of his not complying with rules, orders, or regulations made to obtain an advance of wages, etc., or should endeavor by such means to force an employer to change his mode of conducting his business,-- the offender should be imprisoned for not more than two months. Sec. 6 imposed the same punishment upon persons who "combine and" do the above things; the criminality being evidently attributed to the acts done, not to the mere combining to do them. The other section provided summary proceedings for cases arising under the act, and certain other matter relating to procedure.

The Act of 5 George IV, cap.95 remained in force but a single year. It was repealed and replaced by the Act of 5 George IV, cap.129(1825). The details of the former act, and not its underlying principle, are changed. After reciting that the provisions of the Act of 5 George IV, c.95 "have not been found effectual," and reenacting the long repealing section of the former act, the new statute (first repealing the old one) forbids the accomplishment, "by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another," of certain purposes. These were but a more comprehensive enumeration of the purposes forbidden by 5 George IV, cap.95, sec.5, and embrace the following:



forcing or endeavoring to force, by the above means, any workman to quit work, to return his work before the same shall be finished, to refuse to accept employment, to belong to any club or association, to pay any fine or penalty for not belonging to such club or for not complying with any order of regulation for the advancement of the unionists' policies or for not contributing to the union funds; also, by the above methods, forcing or endeavoring to force any employer to alter the mode of carrying on his business, to limit the number of his apprentices, or to limit the number or description of his workmen. "Every person so offending, or aiding, abetting or assisting therein" was made liable, upon conviction in a summary proceeding, to imprisonment at hard labor for not more than three months.

The above acts were rendered criminal whether perpetrated by an individual or by a combination. Certain labor combinations, however, by a carefully drawn section of narrower scope than the corresponding section of the former act, were expressly declared not to be criminal, in these words (Sec. 4): "Provided always, and be it enacted, That this act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering





into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work in any manufacture, trade or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing; any law or statute to the contrary notwithstanding." Sec. 4 extended the same protection in the same words to masters who meet, consult and agree upon rates or wages and times of working to be paid to or required of their journeymen, workmen or servants.

The policy of making cognizable the acts done irrespective of the combination, and also of allowing the workmen freedom to combine as far as compatible with the legitimate interests of the employer and of the public, was continued and extended in subsequent Acts. Most of these were intended to specify with greater accuracy and detail what particular methods workmen might not employ in furtherance of trade disputes. Attempts to widen their right to combine, however, were made in a few instances. The Act of 20 Victoria, C.34 (1859), explanatory of the Act of 3 George IV, C.129, declared "that no workman or other person, whether actually in employment or not, shall by reason merely of his entering into an agreement with any workman or workmen or other person or persons, for the purpose of fixing or endeavoring to fix the rate of wages or remuneration at which they or any of them shall work... be subject to any prosecution or indictment for conspiracy." A further protection to trade unions in this respect was given by the Act of 34 and 35 Victoria, C.31, s.2: "The purposes of any



trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise." This principle was retained in the Act of 34 and 35 Victoria, C.32 (proviso at end of sec.1), which repealed Acts 6 George 4, C.129 and 22 Victoria, C.34. The final stage in the decadence of the importance of criminal conspiracy as applied to labor combinations is to be found in the "Conspiracy and Protection of Property Act, 1875," 38 and 39 Victoria, C.86. Sec. 3 of this act provided: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employees and workmen shall not be indictable as a conspiracy if the same act committed by one person would not be punishable as a crime." This provision extends to combinations for the above purposes a protection from prosecution not enjoyed by combinations with different objects. And the "Trade Disputes Act, 1906," 6 Edward VII, C.47, similarly denied to the element of combination any effect even upon the civil liability incurred by workmen for what they might do in the conduct of a strike, etc., providing (Sec.1): "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

From the history of legislation touching combinations of labor we turn to a review of the decisions of the courts upon the same subject.



Up to the year 1721, combinations among workmen to raise their wages or otherwise to alter the conditions of labor were not apparently regarded as criminal conspiracies at common law. Such combinations were certainly not included in the Definition of Conspirators(33 Ed.1). As long as conspiracy retained its original technical meaning and narrow scope, of course, neither court nor counsel would be likely to think that combinations of labor were judicially cognizable. Hence the number of early statutes upon the subject. The frequency of these acts, and the terms in which they were couched, would seem to indicate a belief that the combinations prohibited were being made unlawful for the first time. Indeed, since the objects for which these combinations were formed were for the most part forbidden by the various statutes of laborers, the early anti-combination laws tend to show that the definition of conspiracy was not currently regarded as including even combinations to violate a statute.

In 1721(8 George 1), just one year after the passage of the Act declaring illegal all combinations among tailors to raise their wages, etc., the famous case of the King vs. The Journey-men-Tailors of Cambridge<sup>(a)</sup> arose. This decision, which declared that a combination to raise wages was a conspiracy at common law, so profoundly affected the attitude of the courts toward such combinations in later times that a careful analysis of it should be made.

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(a) 8 Mod.11(Nov. 6, 1721).



One Wise and several other journeymen tailors, of or in the town of Cambridge, were indicted for a conspiracy to raise their wages. Upon a verdict of guilty they moved in arrest of judgement. Among other objections, it was urged that no crime appeared upon the face of the indictment, "for it only charges them with a conspiracy and refusal to work at so much per diem, whereas they are not obliged to work at all by the day, but by the year, by 5 Elizabeth, C.4." In reply, the prosecution boldly affirmed "that the refusal to work was not the crime, but the conspiracy to raise the wages."

The court sustained the position of the prosecution. "The indictment," they held, "it is true, sets forth, that the defendants refused to work under the wages which they demanded; but although these might be more than is directed by the statute, yet it is not for the refusing to work, but for conspiring, that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of the Tubwomen vs. The Brewers of London"....

The defendants further urged that since the offense was a crime within the stat. 2 and 3 Ed. 6, C.15 and the "late statute 5 George 1, C.15," the indictment should have concluded "contra formam statuti." For the king it was replied that the defendants had been indicted, not for "the denial to work except for more wages than is allowed by the statute, but it is for a conspiracy to raise their wages," which is "an offense at common law." The court again sustained the prosecution, saying: "This indictment need not conclude contra formam statuti,





because it is a conspiracy, which is an offense at common law." Accordingly, the judgement "was confirmed by the whole court quod capiuntur."

The authority of the Journeymen Tailors' Case has been called in question by later writers, and doubts have been thrown upon the authenticity of the report which has been preserved to us. There is indeed little question that the case represents a notable piece of judicial legislation. The principles laid down in it, however, are thoroughly in harmony with the development then taking place in the law of conspiracy in general. They can be deduced from certain wider principles current at the time, and are enforced by several cases of an analogous character decided previously.<sup>(1)</sup>

However this may be, the fact remains that the Journeymen Tailors' Case settled the law for the time being, that a combination of the kind therein discussed was<sup>a</sup> criminal conspiracy apart from legislative enactment. This appears both from the statutes and from the cases. The language of the former undergoes an immediate change. The phraseology of the Act of 12, George 1, C.34, passed four years after the decision of the above case, as compared with the Act of 7 George 1, enacted the year before, is very significant.<sup>(2)</sup> Without going into details, it may be said that the language of the statutes passed after 1721 unmistakably indicates that the combinations attacked were looked upon as already contrary to law, and that the purpose of the acts was to declare the law and to make "more effectual provision....against such unlawful combinations"<sup>(a)</sup>

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(a) Preamble, 30 George III, C.81.



Turning now to the cases, we find the doctrine of the Journeyman Tailors' Case approved obiter by Lord Mansfield. In Rex vs. Eccles<sup>(a)</sup> (1783), he said: "The illegal combination is the gist of the offense, persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offense." The same principle was cited in the argument of counsel for the king in Rex vs. Hawkes<sup>(b)</sup> (1796), and was recognized (though again obiter) by Grose, J., in the same case, thus: "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal. As in the case of Journeymen conspiring to raise their wages; each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy." The above passages, together with the language of Grose and Lawrence, J. J., in Rex vs. Marks<sup>(c)</sup> (1802), clearly indicate that the courts of the eighteenth century entertained little doubt as to the illegality at common law of the combinations prohibited by the Acts 39 and 40 George III, and that they were also

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- (a) 1 Leach Cr. L. 274, 276.
- (b) 6 T.R. 619, 628, 636.
- (c) 3 East. 157. See post, p. 138.



thoroughly in accord with the common view which Lord Mansfield expressed.

There are two cases<sup>(1)</sup> in the books arising out of the Anti-combination Law of King George III. In only one of these (Roe vs. Slaughter) was a combination of workmen punished. The question there was as to the sufficiency in point of form of the restriction imposed by the contract and not of the substance. The result of King's Bench, regarding the order of the court of sessions holding the combination defective in form, merely decided that the combination was sufficient.

The most important cause relating to combinations of labor came after the Act of George IV, C. 330. This statute, as we have seen, expressly legalized agreements among workmen to combine to raise or lower wages, but prohibited the accomplishment of this and other purposes by force, threats, obstruction or sedition. As soon, however, as the workmen understood as extensive the right of combination so conferred upon them, they came into immediate conflict with the courts. The juries had not experienced that complete change of opinion which has led Parliament to repeal the Anti-combination Law. They were conscious of protecting the master, as far as possible, from that interference with his freedom of the labor of his dissatisfied employees. The result was to restrict within very narrow limits the privileges granted by the statute. This object the courts attained largely through the agency of the

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(1) Roe vs. Slaughter, (10 M.) 371. and A. 237; Doe vs. Dicks et al. (1800), 1 East 117.



common law doctrines regarding criminal conspiracy. Our present purpose, however, requires us only to ask, "How far was the definition of conspiracy modified or extended by the demands so put upon it?"

Whatever may have been the views of the judges as to the legality or illegality per se of a strike, it seems never to have been suggested that a combination among workmen to secure an increase in wages by a concerted refusal to work was a criminal conspiracy after the 6 George IV, C.119. It was never even urged in argument that the damage thus inflicted upon the employer might amount to an obstruction or molestation within the Act. This, however, is not surprising. The statute plainly contemplated the employment of the strike as a means of making effective the combination to raise wages. The matter was regarded as too obvious for comment, as appears in the language of Rolfe, (afterwards Lord Cranworth), in Reg. vs. Selby et al <sup>(a)</sup> (1847): "It is doubtless lawful for people to agree among themselves not to work except upon certain terms".....

Up to this point the law was clear. But a strike cannot succeed if the employer is allowed to engage new workmen in the strikers' places and carry on his business unimpeded. Hence, the courts were soon called upon to decide whether a concerted effort on the part of the ex-employees to procure a cessation of labor by the strike-breakers was lawful under the statute. This point was first raised in Reg. vs. Selby et al. <sup>(b)</sup>

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- (a) 5 Cox C.C. 49 (note), 493.  
(b) 5 Cox C.C. 495 (note).





(1847), the case just spoken of. There the strikers' attempts, by means of pickets, persuasion, handbills, etc., to induce the new workmen to quit work caused them to be indicted for a conspiracy to impoverish the employers. The court ruled that the question was as to the character of the methods utilized. If the strikers or the pickets had used threats or intimidation, they were guilty of conspiracy: these are "illegal means". But as to persuasion and peaceable inducement, he said: "it is doubtless lawful for people to agree among themselves not to work except upon certain terms; that being so, I am not aware of any illegality in their peaceably trying to persuade others to adopt the same view..... My opinion is, that if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations complied with in a peaceable way, that it was not illegal. If I am wrong, I am sorry for it, but my opinion is, that this is the law".....

Doubts, however, were cast upon this doctrine by the language of Erle, J., in Reg. vs. Duffield<sup>(a)</sup> (1851), and Reg. vs. Rowlands, (1851), both of which cases arose out of the same events. In the Duffield Case, after conceding the right of workmen to combine to fix their wages by refusing to work, he said, (p. 431): "But.... I think it would be most dangerous.... to suppose that workmen, who think that a certain rate of wages ought to be obtained, have a right to combine together to induce men, already in the employ of their masters, (to leave) for the purpose of compelling those masters to raise their wages

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(a) 5 Cox C.C. 304; 18. 436.







guilty of 'molestation' or 'obstruction', within the meaning of the said Act, and shall not therefore be subject or liable to any prosecution or indictment for conspiracy." The above provision, however, was not to apply if the strikers or the strike-breakers were bound by contracts of service.

In several subsequent cases<sup>(a)</sup>, it was decided that the Statute 22 Vict., C.34, and legalized peaceable persuasion to quit work, "no matter what the consequences were"<sup>(b)</sup> It was also announced as a corollary to this proposition, that a peaceful picket system whose purpose was merely persuasion and inducement to quit work, was lawful. The courts were careful to state, however, that such pickets would be allowed to resort to no manner of threats or intimidation.

The attitude of the courts toward even peaceful picketing changed after the passage of the Acts of 1871 and 1875. Both of these statutes endeavored to define what should be considered "molestation and obstruction" upon the part of the workmen. The Act of 1871 declared that a person should be deemed to molest or obstruct another person...(3) "If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place"... Section 7 then repeals the 5 George IV, C.119 and the 22 Vict. C.34. But the instruction of Cleasby, B., in Reg. vs. Hilbert et al.<sup>(c)</sup> (1875), showed clearly that the

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(a) Reg. vs. Drutt (1867), 10 Cox C.C. 598; Reg. vs. Hilbert (1875) 13 Cox C.C. 82.

(b) Reg. vs. Shephard, 11 Cox C.C. 325 (1869).

(c) 13 Cox C.C. 82, 87.



court still regarded peaceful picketing as lawful, and did not consider a combination so to picket as a criminal conspiracy, notwithstanding passage of the Act of 1871 and the repeal of the 22 Vict. C.34. The act of 1874, accordingly, was somewhat differently worded in this respect. Sec. 7 imposed a penalty of fine and imprisonment upon "every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,-... (4) Harass or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place;"... Then a subsequent clause of the same section declared: "Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

The courts, quite properly it would seem, took the view that the language in which section 7 of the later Act was couched manifested an intention to forbid picketing for any purpose other than the gathering and communication of information. This point is well brought out in a bit of dialogue which occurred in Reg. vs. Bauld<sup>(a)</sup> (1876). Parry, Serjeant, argued: "As to the charge of 'watching' and 'besetting' your Lordship is aware that there are two views which may be taken. If it were

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(a) 13 Cox C.C. 242, 243.





merely done for the purpose of persuading the men to quit their employment it would not be illegal.

"Huddellstone, T.,- I cannot assent to that view of the law. The statute allows watching or attending near a place for the purpose of obtaining or communicating information, and this is the only exception."

"Parry Serit.- I accept your Lordship's correction, and I am sure that the men will accept your Lordship's exposition of the law now that they have heard it"...

The Act of 1876 was similarly construed in the later cases. In Lyons vs. Wilkens<sup>(a)</sup> (1898), an injunction was granted to restrain the defendants "from watching or besetting the plaintiff's works for the purpose of persuading or otherwise preventing persons from working for them or for any purpose except merely to obtain or communicate information".... The decree of the lower court was confirmed by the Court of Appeal.<sup>(b)</sup> During the following year (1899), two injunctions were issued forbidding the strikers to attend at steam-boat landings and railroad stations to persuade incoming strike-breakers to go away.<sup>(c)</sup> The theory embodied in all these cases was simply that such acts constituted a "watching and besetting" for purposes other than the gathering and communication of information, and were therefore in violation of the Act of 1876.<sup>(7)</sup>

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(a) 68 L.J. Ch.601, 604.

(b) 68 L.J. 148.

(c) Charnock vs. Court, 7 Ch.(1899) 35, Walters vs. Green, 68 L.J. 730.



It is clear that the decisions of the courts in respect to combinations for the above purposes do not in any way modify or extend the general conception of criminal conspiracy. In each case the question was whether the acts complained of amounted to a violation of the statutes. If this question were answered in the affirmative, the combination was used for its object the commission of a statutory crime. The illegal character of its design was thus manifest, and the agreement clearly fell within Lord Denman's definition of conspiracy. That this was the view taken by the courts appears from the language sometimes employed, and is also evidenced by the fact that in many - particularly the later - cases, individuals were often punished for persuading others to strike, picketing, and the like, without reference to the element of combination which might be present. And when the injunction began to take the place of criminal prosecutions in such cases, all mention of combination as a constituent of the offense practically ceased.

What has just been said applies all the more fully to combinations to advance the interests of workmen or masters by acts or threats of physical violence and intimidation. Such methods are mala in se as well as mala prohibita, and render punishable the individual who employs them as well as the several individuals who combine to employ them. And the same is, of course, true if the acts to be performed are violatory of the statute, although not mala in se. These are criminally cognizable whether done by a single person or by a combination;<sup>(1)</sup> and in recent years the practice has arisen of restraining them in proper cases by injunction.<sup>(2)</sup>



A more difficult question is raised by combinations among workmen to force their master, by threatening to strike, to discharge certain persons already in his service; or to compel satisfied employees, by threat of expulsion from the union, boycotting, etc., to quit work. These cases are at first perplexing, but upon closer examination they are seen to present no real exception to the principle that a criminal conspiracy must have an illegal object or make use of illegal means.

The cases in which the defendants were indicted for a combination of the kind just described are few. The first was Rex vs. Rykerdike <sup>(a)</sup> (1832). The charge was a conspiracy to compel the discharge of certain workmen by threat of a strike. It was argued in behalf of the defendants that the men had a right to combine not to work by virtue of the Act of 6 George IV, c. 129. The prosecution replied that the statute would not protect a combination of the present character, but only a combination to obtain higher wages, to regulate hours of work, etc. The court took this view, and instructed the jury "that the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ; and that this compulsion was clearly illegal."

The only other case in which the indictment was grounded upon a conspiracy for the above purpose was Rex. vs. Hewitt et al. <sup>(b)</sup> (1851). Here was an indictment for "a combination by workmen, contrary to 6 George IV, c. 129, and for a conspiracy."

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(a) 1 Moo. and R. 179.  
(b) 5 Cox C.C. 122.



The defendants were officers and members of the "Society of Miners", a socialist society, organized since the 19th century. The society, in accordance with its rules, had instituted upon these miners, members, a tax of two pence per month as a fund to which they contributed, for cases. Upon the refusal to pay, the other members refused to work with them in consequence deprived of its employment. Lord Campbell said that the society was legal and beneficial, "but it cannot be permitted that, under the guise of such laudable objects, the workers shall enter into a combination or conspiracy to injure others. If law, every man's labor is his own property, and he may make what bargain he pleases for his own enjoyment; not only so - masters or men may associate together, but they must not injure their neighbors; they may, not so they, which may injure another man. The law requires care not to do that which is contrary to which they do not approve, but they must not prevent another from doing so....They cannot be permitted to injure their neighbors in carrying out what which they may consider to be a protection to themselves." The defendants were accordingly found guilty.

Continued with In re Perkins (1892)<sup>(a)</sup>, however, the element of combination in offenses of this nature ceased to be of primary importance. Perkins had told certain workmen that if they agreed to work for a certain employer, "we would consider them as friends, and we would do all in our power to assist them."

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(a) 17 Q. B. 361.

















1914, 1917, it was merely "intimidation" in the sense  
to strike, or to strike & strike, for the purpose of securing  
the discharge of workmen, or, etc., and no criminal intent  
within the meaning of the Act of 1875. In Curran vs. Treleaven,  
it was held in 110 N.E. 2d 1000, 1001, 1002, 1003,  
decided in 1944 that the act of 1917, N. H., was intended to  
be in this respect. In the trial of these cases, the govern-  
ment had been successful for an offense under Sec. 7 of the Act. As  
a result of the "Amalgamated Society of Engineers", it  
had informed Palmer & Co., in pursuance of a resolution of the  
Society, that all employees would quit work unless the Assistant  
(also an employee of Palmer & Co.) would resign his membership  
in the "National Society of Engineers" and join the "Amalga-  
mated." As a result, the Assistant was dismissed. Similarly,  
in Curran vs. Treleaven, the appellant, as secretary of the  
"National Union of Carpenters and General Laborers", had called  
a strike to compel Treleaven to discharge certain non-union  
men. The Supreme Court of Massachusetts held that these acts did  
not constitute "intimidation" in the sense in which the term  
is employed in Sec. 7 of the Act of 1875. In Gibson vs. Lawson,  
Coleridge C.J. said that acts not indictable under that stat-  
ute "were not law, if indeed they ever were, indictable at  
common law". In both cases, the court intimated that "intimid-  
ation" means "a threat of personal violence."

As we review this series of decisions, in the endeavor to  
determine whether they broaden the scope of the crime of con-  
spiracy, we may say that Curran vs. Treleaven and Gibson vs. Lawson





any real question. In that case, Lord Campbell apparently based the illegality of the combination squarely upon the fact that its purpose was to inflict damage upon a third person. As no illegal means were contemplated, Lord Campbell evidently regarded the object as illegal because oppressive and hurtful in its actual effect upon that person. Such a conclusion was not supported by the preceding authorities.

In respect to Reg. vs. Hewitt, however, we may point out that it was never followed in the later decisions. On the contrary, as has been shown, the element of combination in similar cases was first relegated to a subordinate position, and was shortly afterward eliminated altogether. The courts soon came to observe that the acts done might be construed as violations of the statute. Naturally the judges chose this method of protecting masters and non-union men in preference to stretching out of all semblance of certainty the already too shadowy principles relating to criminal conspiracy. Lord Campbell, therefore, correctly voiced the judicial policy of the period in declaring criminal the actions charged, but the reasons which he adduced in support of his decision were different from those subsequently adopted.

Walsby vs. Ayley, and O'Neill vs. Longman are seen, upon close examination, not to be in conflict with the general law of conspiracy. In the first place, the statements by the court that these combinations were "illegal" were really not necessary. The indictments had charged, not conspiracies, but the statutory crime of having attempted by threats to coerce. The courts



needed only to have held broadly, as was done in subsequent cases, that the acts proved constituted intimidation. But even if the judges had said that the same acts done by a single individual would not amount to a threat, they would not thereby have enlarged the legal conception of conspiracy. Such a statement would mean only that the intimation of an intention to employ concerted action would have a coercive effect which the threat of individual action could not produce. But this undoubted truth does not necessarily involve the assertion that the mere combination to effect the particular purpose in view is in itself a criminal act.

Again, the combinations were said to be "illegal". But they might be "illegal" without being at the same time "criminal".

In Rex vs. Rykerdike, however, such a combination appears to have been held indictable. Remembering this, and assuming also that the courts in Walsby vs. Abley and the later cases intended to declare that these combinations were still criminal, let us inquire whether the latter really fall outside of Lord Denman's antithesis.

The Anti-Combination Laws of George III were currently regarded as being in affirmance of the common law of conspiracy, and it was generally thought that the combinations merely prohibited were criminal quite apart from the statute declaring them so. The Acts of 5 and 6 George IV testify to a change of Parliamentary policy in respect to labor combinations. But the courts still regarded with unfriendly eyes agreements among workmen in furtherance of trade disputes. This feeling of hostility was reflected in the judicial interpretations of the



Act of 6 George IV, C.129. It was repeatedly declared that this Act, by repealing former statutes, had revived the common law relating to combinations of labor. But at common law, the judges said, such combinations were illegal and criminal. Hence, a special statutory exemption was necessary to legalize any combination among workmen to advance their interests by the peculiar methods usually employed by them for that purpose. Now the Act of 6 George IV, C.129, expressly legalized only combinations to advance wages, etc. Combinations for any other object, therefore, remain criminal by the common law; and since combinations to compel by threat of strike the discharge of other workmen, etc., were not in terms declared lawful, they were still regarded as criminal, in spite of the Act of 6 George IV.

The above view plainly inspired the decision of Patteson, J., in Rex vs. Bykerdyke (1834).<sup>(a)</sup> It was expressly announced by Crompton, J., in Wilton vs. Eckersley (1855);<sup>(b)</sup> and although Lord Campbell in the same case expressed the opinion that combinations to raise wages were not criminal at law, the later cases proceeded upon the other theory. Thus, Crompton, J., in Walshy vs. Anley<sup>(c)</sup> said: "Statute 6 George IV, C.129, by repealing all the previous statutes on the subject, appears to me to have

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- (a) 1 Moo. and R.179.
- (b) 6 El. and Bl.47.
- (c) 3 El. and Bl. 516.



re-established the common law as affecting combinations of masters or workmen. I adhere to the opinion that, at common law, all such combinations are illegal..... That being so, it was necessary, by sections 4 and 5 of the statute, to render legal the combinations therein referred to respectively, and which would, at common law, have been illegal." Whence it followed that since the combination then before <sup>did not</sup> retain the protection of those sections, it remained illegal. Likewise, Brett, J., in Rev. vs. Hunt <sup>(a)</sup> (1872) ruled that the Act of 1871 had not affected the common law of conspiracy, except as to matters expressly provided for. This case was criticized by Coleridge, C.J., in Gibson vs. Lawson <sup>(b)</sup> (1891), who laid down the principle in respect to the Act of 1875 that acts not indictable under that statute "are not now, if indeed they ever were, indictable at common law." But the former view recurred in Lyons vs. Wilkins <sup>(c)</sup> (1898). Smith, L.J., stated that the Acts of 1871 and 1875 had legalized certain otherwise illegal acts, and that as the acts complained of did not come within the statutes, they remained illegal.

Thus it appears that the weight of authority is upon the side of the principle that combinations among workmen to dictate to their master whom he should employ were illegal and criminal at common law, and were not rendered legal by the Act of George IV, C.129. The real reason, however, was that the means

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- (a) 12 Cox C.C. 314.
- (b) 61 L.J.M.C. 9, 18.
- (c) 65 L.J.Ch. 201, 611.





This brings us to the essential point in our inquiry. Why were combinations of the above character illegal at common law? There is some evidence of a judicial opinion that the means, - namely, strikes - to be employed for accomplishing the purpose of the combination should be regarded as unlawful. For example, Blackburn, J., in Hornby vs. Close, (1847), said: "Further, I think this society is constituted for an illegal purpose----The Justices have found, and were justified in finding, that the object of this society was to encourage strikes." This view recurred as late as 1890. In Lyons vs. Wilkins, decided by the Court of Appeal, Smith, L. J., said: "Prior to that date (1891) I do not think there can be a doubt that a strike or a picket would have been illegal." Kay, L. J., expressed the same opinion, and then added: "The combination of a number of persons to induce and encourage and bring about a strike would also have been an illegal act."

But the real reason for this hostility on the part of the Court was more fundamental. We find little difficulty in attributing the illegality of combinations to strike or otherwise to advance the interests of labor, not to the material loss inflicted upon the employer concerned, but to the harm supposed to result from their activities to the public at large. The theory that such combinations worked injury to the community as a whole was thoroughly in accord with the trend of political and economic thought until about the end of the first third of the 19th century. Old Toryism



regarded all combinations with a dread springing from a lively remembrance of the Reign of Terror in France. (b) 45.

At a later period, economic thought confirmed this vague distrust of combinations of workmen by adducing the Wage Fund Theory, which taught that labor could not, by any effort of its own, secure a larger share of the fruits of production than the natural play of industrial forces would automatically set aside as a fund for its recompense. From this it would follow that the disturbance and loss caused by strikes were unmitigated evils, since not even the workmen themselves were benefitted by the ruin which they brought upon the business community.

The change in the legislative policy of England toward industrial combinations did not, as we have seen, procure for organized labor the favor of the courts; and their enmity, based largely upon the above elements, found modern expression in the doctrine that such combinations were "illegal" because in "restraint of trade." This principle received its first explicit statement in Rex vs. Marks, et al., decided in 1802, Comparing combinations to promote mutiny and sedition with an association of workmen formed for the purposes of regulating wages and of compelling other journeymen to join it, Lawrence, J., said: "Combinations formed for such purposes are undoubtedly highly prejudicial to the State, and might be the primary object of the attention of the legislature; but I cannot say that combinations like this, which

145. (a) Dicey, "Law & Opinion in England," p. 100.

46 (b) 3 East 157.



strike at the root of the trade of the Kingdom, may not be, though not so immediately, yet ultimately, as mischievous in their consequences, and in the event beset a danger to the state itself, to an extent beyond the power of the government to repress."

As long as the courts assumed that labor combinations were economically harmful, the restraint of trade doctrine so announced was never judicially questioned. But as time went on, the arguments of those who contended that trade unions had a sound economic justification began to attract attention and gain support. The result was the introduction of an element of doubt into the minds of the judges as to the validity of the restraint of trade doctrine in its application to trade unions - a doubt which divided the Court of Queen's Bench in 1869, and led to the annulment of the doctrine, in so far as it raised a criminal liability, by Act of Parliament. This line of development can be traced through a trio of leading cases, covering the period from 1855 to 1869, and culminated in the Act of 34 and 35 Victoria, C. 31, passed in 1871.

The first of these cases was Hilton vs. Eckersley.<sup>(a)</sup> The question was as to the legality of a bond entered into by a number of mill-owners providing for concerted action against certain combinations of workmen. The Court of Queen's Bench held the bond void as against public policy. Crompton, J., said (p. 52): "I think that combinations like those disclosed in the pleadings in this case were illegal and indictable at



common law, as tending directly to impede and interfere with the free course of trade and manufacture.....Combinations of this nature, whether on the part of workmen to increase or of masters to lower wages were equally illegal." The words of Lord Campbell, however, show the influence of advancing economic thought: "I enter upon such consideration with much reluctance and with great apprehension, when I think how different generations of Judges, and different Judges of the same generation, have differed in opinion upon questions of political economy, and other topics connected with the adjudication of such cases." But he finally said: "When I look at this bond, I have no hesitation in concluding that the association which it establishes ought not to be permitted, and that the enforcing of the bond will produce public mischief. I, therefore, feel compelled, as a Judge, to declare that it is void." The Court of Exchequer Chamber affirmed the judgment that the bond was illegal as in restraint of trade.

So much of this opinion as applied to labor combinations was, of course, obiter dictum. But the views therein expressed were approved a dozen years later in the case of Hornby vs. Close, <sup>(a) (1877)</sup> which was directly in point. The defendant had been accused of embezzling the funds of the Bradford Branch of the United Order of Boiler Makers and Iron Shipbuilders. The facts were proved, but the defendant urged that he should not be punished for the reason that the order was not entitled to protection as a Friendly Society

(a) 3 B. & S. 175 (1867).





under Stat. 13 and 19 Victoria, c. 43, and for the further reason that it was illegal and in restraint of trade. The Court of Queen's Bench unanimously accepted this view, holding that the objects of the Society, as disclosed by its rules, were those of a trade union. Cockburn, C. J., cited at length Hilton vs. Eckersley, and concluded: "So the rules of this Society are in restraint of trade, and consequently illegal by the law of the land." Blackburn, J., thought that "this Society is constituted for an illegal purpose," namely, "to encourage strikes." Mellor and Lush, J.J., concurred, holding that the Society was in effect a trade union, and hence illegal. All expressly declined to state whether the combination could be prosecuted as a criminal conspiracy.

The practical hardship worked by the principle laid down in this celebrated case, lent added force to the unionists' arguments, and the influence exerted upon the minds of the judge by economic discussion upon the subject of labor combinations is strikingly shown by the language used in the case of Farmer vs. Close, <sup>(a) 4491</sup> decided in 1869. The facts were identical with those in Kornby vs. Close. The defendant, charged with the embezzlement of the funds of the Amalgamated Society of Carpenters and Joiners, had been released by the Justices of the Peace because they considered that the Society was a trade union and illegal. Its rules, proved in evidence, made provision for strikes and strike benefits. Upon appeal to the Court of Queen's



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Bench, Cockburn, C. J., with whom Mellor, J., concurred, took the narrow ground that this case came within the principle of Hilton vs. Eckersley and Wornly vs. Close. He held that the purposes of the Society, being those of a union, it was not entitled to protection. The policy of the law laid down in these cases he declined to discuss. He admitted that the unions had found defenders, but, "it must not, however, be forgotten that while some strikes may be perfectly justifiable to enforce honest and just demands, others may be resorted to in order to extort unreasonable exactions or enforce tyrannical rules, and the only corrective against such attempts is to be found in the freedom of the labor market, which it is the purpose of these combinations to prevent."

Hannen, J., warmly disagreed with the Chief Justice. He denied that either the rules or the interpretation put upon them in practice showed an illegal object on the part of the Society, unless it were held that a strike is always illegal; and this he would not allow. Of the rule providing that striking members should be sent to other localities, he said: "The tendency of this undoubtedly is to support and maintain the strike for a longer time, and so to increase the chance of the men obtaining the object of the strike. This it is alleged, is in restraint of trade, that is, it disturbs the course and postpones the effect of competition among the men, which, if left to itself, might sooner compel them to



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return to work; and, therefore, it is contended, is contrary to public policy. I think that our judgment ought not to be based on this line of argument. By the expression contrary to public policy, I understand it is meant that it is opposed to the welfare of the community at large. I can see that the maintenance of strikes may be against the interests of employers, because they may be thereby forced to yield at their own expense a larger share of profits or other advantages to the employed, but I have no means of judicially determining that it is contrary to the interests of the whole community, and I think that, in deciding that it is, and therefore that any act done in its furtherance is illegal, we should be basing our judgment not on recognized legal principles, but on the opinion of one of the contending schools of political economists. Hayes, J., "without professing to know much of what is public policy on this subject at the present time, " agreed with Hannen; so the Court being equally divided, the appeal dropped.

Here the Court broke away from its former position that trade unions are obviously without economic justification. The doctrine of restraint of trade as formerly applied was sharply attacked by two of the judges; and those who upheld it made little attempt to justify it, being content with saying merely that that they were bound by the law as laid down in former cases. Under these circumstances we need feel no surprise at the provision in the Act of 1871 (c.31, sec. 2) already referred to: "The purposes of any trade union shall



not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

The foregoing history of the doctrine of restraint of trade enables us to see very clearly that in holding illegal all labor combinations not legalized by statute the Courts were but applying the old principle that a combination to do that which amounts to a public injury is a conspiracy. From this it would follow that combinations to compel an employer by strike to limit the description of his employees fell within the terms of Lord Denman's antithesis.

The above facts, therefore, warrant the conclusion that at no time has the law of England ever denounced as a criminal conspiracy any combination whose purpose, remote or primary, was not considered as being in itself clearly unlawful.





to be employed for this purpose--namely, a strike-- were considered as illegal. This was the view taken by the Court of Appeal in Lyons vs. Wilkins (1898). Smith L.J., said: "Prior to that date (1871) I do not think there can be a doubt that a strike or a picket would have been illegal." Kay L.J., expressed the same opinion, and then added: "The combination of a number of persons to induce and encourage and bring about a strike would also have been an illegal act."

This brings us to the essential point in our inquiry. Why was a strike, and hence a combination to advance the cause of dissatisfied workmen by resort to a strike, considered illegal at common law? We find little difficulty in attributing the illegality of these measures, not to the material loss inflicted upon the employer concerned, but to the harm supposed to result therefrom to the community at large. The theory that such combinations were injurious to the public was accepted as an undoubted truth by political and the economic thinkers until the end of the first third of the nineteenth century. The school of old Toryism feared all combinations, especially combinations of labor, on account of their supposed tendency to overturn the existing social order. <sup>(a)</sup> Economic

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(a) "The public opinion which sanctioned the Combination Act (which was to a great extent a Consolidation Act) consisted of two elements.

The first element, though not in the long run the more important, was a dread of combinations, due in the main to the then recent memories of the Reign of Terror". Dicey, "Law and Opinion in England?" p. 100.



thought gave body to this vague feeling of dread by adducing the wage fund theory, which taught that labor could not, by any effort of its own, secure a larger share of the fruits of production than the natural play of industrial forces would automatically set aside as a fund for its recompense. From this it followed that the disturbance and loss caused by strikes was an unmitigated evil, since not even the workmen themselves benefitted from the ruin which they brought upon the business community. The language of Lawrence, J., in Rex vs. Marks et al<sup>(a)</sup> (1802) possesses a deep significance in this connection. The question was whether the Statute 37 George III, C.123, making criminal the administering of illegal oaths, applied to the members of a combination to regulate wages and to compel other journeymen to join it who had administered an oath to entering members binding them to be true to the association and not to divulge its secrets. It was argued in behalf of the defendants that the Act applied only to combinations to promote mutiny and sedition. Lawrence, J., said: "Combinations formed for such purposes are undoubtedly highly prejudicial to the state, and might be the primary object of the attention of the legislature; but I cannot say that combinations like this, which strike at the root of the trade of the kingdom, may not be, though perhaps not so immediately, yet ultimately, as mischievous in their consequences, and in the event become a danger to the state itself to an extent beyond the power of the government to repress."

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(a) 3 East, 187.



Combinations to compel an employer by a strike to limit the description of his employees were thus, during the first third of the nineteenth century, illegal because their object was to be accomplished by the use of illegal means- namely, a strike. That the illegality of the means lay in the harm inflicted upon the public rather than upon the individual concerned is clearly brought out in Farrar vs. Close<sup>(a)</sup> (1869). This case was decided during a transition period in economic theory regarding labor combinations. The bearing of this transition is shown by the language of Hannen, J. . . Although a strike may restrain the employer's trade, he said, it is not against public policy unless it hurts the community at large. "But I have no means of judicially determining that it is contrary to the interests of the whole community, and I think that, in deciding that it is, and therefore that any act done in its furtherance is illegal, we should be basing our judgement not on recognized legal principles but on the opinions of one of the contending schools of political economists." And it is extremely significant that as the strike gradually came to be regarded as a legitimate weapon in the hands of dissatisfied workmen, the element of combination as the principal and then as a secondary ingredient of crimes growing out of labor disputes lost its prominence and finally disappeared.

From the above facts, therefore, the conclusion may be drawn that at no time has the law ever denounced as a criminal conspiracy any combination whose purpose, either remote or proximate, was not considered as being in itself clearly unlawful.

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(a) 10 B. and S. 553, 568.



But this conclusion standing alone is not a complete  
denial of the legal basis of combinations among workers  
in England. The attitude of the original courts toward such  
combinations can be easily accounted for by a reference to the Statute of 1800 - or  
precisely the Act of 1800. This Act, by providing that a combina-  
tion to do any act in furtherance of a trade dispute shall not  
be punishable as a conspiracy "if the same act committed by a  
single person would not be punishable, as a crime" clearly renders  
impossible any expansion by the courts of the original definition  
of criminal conspiracy in connection with industrial combinations.  
At the same time, the Statute forbade the employers, or single  
persons, or combinations, of a number of the more violent and  
oppressive actions usually reserved to by striking workmen.  
Thus ample original remedies against labor combinations have been  
supplied through ordinary channels, and the courts have con-  
sequently been relieved of the necessity of extending the scope  
of conspiracy, in order to restrain the more violent acts of  
labor unions.

It seems certain, however, that the Courts in England or  
elsewhere would be inclined to take all needful measures to pro-  
tect employers against union activities, however oppressive, how-  
ever might be the nature of the specific acts done for the pur-  
pose. By means of legislation in regard to the punishment of  
murdering two men for aggression to be the same as a single individ-  
ual who will knowingly will result to loss of public welfare  
because he tolerates the combination, an individual person without  
the power of a combination that which only a combination of persons sit-  
ting in combination can inflict. The current morality brands





some conduct or wrong; and the defendant cannot be held to  
leave the plaintiff as to the liability of allowing anyone of  
the plaintiff's family. In refusing the master's action against  
a trespasser by the part of compensation of property, the master  
may prefer, where possible, to do so without regard to whether  
the element of causation is proved. Thus, in the master's  
negligence, however, the master is held to desert greatly  
in some cases the fact of causation being a liability, even  
before, perhaps, to liability, original.

The third statement of the master's liability in the master's  
of the element of causation in civil cases. This is closely  
based on the certain doctrine relating to causation and liability,  
which is a certain doctrine of which must precede.

After the passage of the Act of 5 George 4, c. 117, 1811,  
which was a statute to strike for certain persons, the  
courts began to find causation that the lawfulness of the  
conduct of the master is general depending upon their real object.  
This first appeared in Reg. vs. Roderick (a) (1851). Question  
of a combination would be made and others of which a raise of  
wages, etc., said: "I consider the law to be clear only to  
that point - would the purpose of the combination is to obtain  
a benefit for the public and justice - a benefit which they  
can claim. I think that remark, because a combination for  
the purpose of improving another is at once a combination of an  
unlawful, unlawful nature, and the law allows the master to

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(a) 12 Q.B. 185, 186, 187.







(1891), wherein it was held that a notice to remove the shareholders of non-union but yet not intimidated within the scope of the Act of 1891, sec. 7, it was indicated that and the proof shown to "unlawful conspiracy" to injure, or "malice in fact", the acts of the defendants being both malicious and actionable. In Trotter vs. London Etc. Trust <sup>(a)</sup> (1898) an injunction was granted against the black-listing of certain non-union men and non-sifters, upon the authority of the Malicious Communications Act, 1897. Kekewich, J., said: "Their own private war, of course, and of the object of their action, and it was to some extent - so use a philosophical expression - the 'final cause' of their action. But it was not the only cause, and I have no doubt from the evidence before me that another motive, and the principal and primary motive, was to injure the workmen mentioned in the 'Black List' and also Messrs. Trotter and Sons, and to prevent them from carrying on their lawful trade or business with that freedom which is the privilege of Englishmen. That seems to me to be the direct object of the defendants' procedure, and is therefore, according to Lord Field, actionable." And in Lyons vs. Wilkins <sup>(b)</sup> (1896), Kekewich, J., granted a preliminary injunction restraining the defendants "from maliciously inducing or attempting to induce persons not to enter into contracts with the plaintiffs". He said: "If you have to forward your own interest by injuring the rights of others, it seems to me that it is a malicious motive." This portion of the judgment, however, was affirmed and applied in the decision of Allen vs. Flood <sup>(c)</sup> (1898), and

(a) 18 Q.B. 413.

(b) 13 Q.B. 672, 673.

(c) 13 Q.B. 181, 182.



reason, as stated by Justice, J.,<sup>(a)</sup> said: "It may sometimes be the plaintiff's fault, but usually not charged against him, that he was misled: and it is not the fault, or liability, dependent on the fault of Lord's, but of the existence of a malicious motive, which is such a case as this reader should be well acquainted with, and is harmful".

The above doctrines were such as to enable the courts to interfere upon the ground of malice and many cases arising, their very nature characterizing them as being combined in fact, without express reference to the element of combination itself. But the decision in Allen vs. Flood that a malicious motive cannot transform an otherwise legal act into an actionable wrong closed this avenue of redress. The result was the cautious holding by the House of Lords in Quinn v. Leathey that the wrongful and malicious inducement by persons acting in concert, of the plaintiff's customers and servants to cease dealing with him, was actionable, in spite of the decision in Allen vs. Flood. One of the distinctions drawn between the two cases was the fact that the present case was characterized by the element of conspiracy which had been lacking in the earlier case. And several of the judges expressly stated that an individual may do certain acts which a combination may not do, because the effects of concerted action are much more dangerous, coercive, and alarming than those of individual action. A grain of gunpowder is harmless, whereas a powder is destructive.

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(a) 17 L.R.C. 301, 302.





This principle was approved in the later cases. In Gillian vs. National Amalgamated Lorrymen's Union of Great Britain and Ireland <sup>(a)</sup> (1903), it was applied to a combination among trade union officials to prevent, on certain occasions, a person from obtaining employment. In Edinburgh Wines' Federation vs. Glasgow Coal Company <sup>(b)</sup> (1908), Lord Lindley expressly said: "It is useless to try to prevent the fact that an organized body of persons acting together can procure results very different from those which could be produced by an individual without assistance. Moreover, laws adapted to individuals are useless in cases where others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and justified by this undeniable truth." And the House of Lords, in Sweeney vs. Coote <sup>(c)</sup> (1907), the latest case involving combination brought before it, was careful to decide only that the evidence was not sufficient to support the allegation of a conspiracy to injure the plaintiff in her business and employment. The Lord of Albury went so far as to intimate that the case might be otherwise with a combination to procure her dismissal on account of personal objections, ill-will or spite.

The result of these and other cases <sup>(6)</sup> was an agitation by trade unionists which led to the passage of the "Trade Disputes Act, 1906" 6 Edward 7, c. 47. In this act the attempt is made to reverse the principles laid down in the cases mentioned in

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- (a) (1903) 1 T.R. 1, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.
- (b) 1 T.R. 1, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.
- (c) (1907) A.C. 121.



previous legislation in England that has been construed as imposing upon the employer of "any person" liable for the acts of his employees, whether committed while in combination or not. (Sec. 11: "An act done in pursuance of an agreement or combination of two or more persons, whether made before or after the act, is actionable if it is done without lawful excuse or justification, and is actionable, whether or not it is done in pursuance of an agreement or combination, if it is done without lawful excuse or justification, and is actionable.")

This statute is the culmination of the attempts made by the Legislature in England to deal with acts done in the course of the struggle between capital and labor, without regard to the element of combination. How it will be judicially interpreted cannot be foretold, as no case of the proper character has as yet come before the courts. We may venture the opinion, however, that even this Act need not have the effect of removing all efficacy from the numbers of the persons cooperating to employ them. The courts in the more recent cases have shown a disposition to regard chiefly the nature and effects of the acts done in concert, and to notice the combination only in so far as it invests certain acts with qualities which individual acts do not possess. From this it would follow that if a single person were placed in a position which enabled him to wield the combined powers of a multitude, he should be subjected to a proper degree of legal responsibility for his acts. And evidences are not wanting that the courts may take this view. In Quinn vs.







any right is really an individual which may not be borrowed by the state or their exercise is an individual business. Thus, in the Trade Disputes Act, Parliament has been assumed to declare that at any time in the history of man the state shall not be responsible "on the ground only that it has not been able to secure to them a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he will." Unless the courts change their attitude, however, even this declaration may not be sufficient. They may hold that the state compliance of violating other rights so fundamental (e. g. the "ordinary rights of citizenship") that Parliament will hesitate long before giving its trade unions free leave to disregard them. It appears, therefore, that until the policies and methods of the unions shall have secured a fuller endorsement by public opinion, non-union men and others will continue to suffer a tolerable degree of oppression from the more flagrant varieties of interference and oppression on the part of organized labor.





# NOTES

## CHAPTER 1

Note 1, (p. 2)            This conclusion is strengthened by the fact that the "villainous judgement", subsequently rendered against conspirators convicted at the suit of the King, is given by no statute, and was believed by Lord Coke and Serjeant Hawkins to have been derived from the common law.

Coke, 3 Inst., cap. 66, p. 143; cap. 101, p. 222.  
Hawkins, "Pleas of the Crown," (Ed. 1762), Ek. 1, ch. 72, p. 193.



## NOTES

### CHAPTER I

Note 2, (p. 4) We can readily conjecture why the fact should be so. From the very earliest times the law of England had always been particularly severe in denouncing false accusations in a court of justice. And the newly-founded supremacy of the royal over the communal courts, which had become nearly complete during the reigns of Henry III and Edward I, doubtless heightened the enormity of these offenses. The improved methods of procedure in the King's courts, the increase in litigation caused by the restoration of order and the establishment of a regular judicature, and especially the rigor and effect with which the judgments of the courts were enforced would naturally render false accusations, vexatious suits, and fraudulent perversions of justice not only more frequent but also far more serious than they had formerly been. The original law was harsh in its treatment of suspected felons, and was not as solicitous as it is now that the accused should be given every chance to prove his innocence. Hence, a perversion of the new process of indictment would furnish a ready means of paying off an old grudge. The multiplication of cases of this kind would soon attract the attention of the judges and make them desirous of finding some method whereby this employment of the machinery of the law as an engine of oppression might be stopped. Now such enterprises almost always require the co-operation of a plurality of performers. Hence, the judges would soon observe that the false prosecution might



N O T E S (1)

be in some degree hindered by an interference with <sup>the</sup> original combination. In this way, the conspiracy would in time come to be considered as at least an element in the offense, and punished as such.



Note 3. (p. 7) That even the criminal law punished conspiracy only after the performance of an overt act is rendered a priori probable by the fact that until about the time of King Charles II the large majority of the conspiracy cases in the books are civil actions for damages. In the nature of things the importance of the act done must be greater for the purposes of a civil suit than the mere combination to do it. The influence of this principle is seen in the rule that a writ of conspiracy would not lie unless the plaintiff had been actually accused of a felony before a competent tribunal and legally acquitted by the verdict of a jury. As the criminal law of conspiracy closely followed the principles worked out in the civil courts touching other aspects of the offense, the influence of this great principle also must have affected the attitude of the criminal courts toward the same matter. It is profoundly significant that when the criminal law governing unlawful combinations began to widen, new cases were brought in under the name of confederacy. For many years "conspiracy" and the technical meaning assigned to it by the civil courts in connection with cases arising upon writs of conspiracy.





Note 4. (p. 4) Bigelow, in his "History of the Law of Tort", (p. 111), remarks of this act as having been passed "about the same time" with the "Articuli super Charles". Italizing the phrase in the writ given by the former act "assensum ordinationem nostram super iure privatis", he continues: "From this it appears that this stat. is (which is claimed to have been of uncertain date) was subsequent to that of the 21 Edw. I, and that the first act above mentioned was designed to afford a simple private remedy to the person aggrieved, as well as a public prosecution".

The better opinion seems to be, however, that this ordinance is not a new enactment, but an inexact transcript or reproduction of the 21 Edw. I, with the addition of a specific writ subsequently devised. None of the other authorities mention any ordinance passed between 21 and 26 Edw. I. The instrument under discussion states only that the King "thus commanded", etc.: it does not direct anything to be done, beyond saying that "such shall be the writ made for them." The contents of the instrument are practically identical with those of 21 Edw. I, except for the writ. So one is forced to conclude that this instrument is nothing but a recital of the Act. of 21 Edw. I, accompanied by a definite writ to be used in the premises.

On the dates of these ordinances, see notes in 1 Statutes at Large (Tomlins Ed.) pp.



# NOTES

Note 5. (p. 12) Of this statute Fitzherbert says: "There is also another writ of conspiracy which is given upon the statute called Articuli super Chartas, 28 Ed. 1, cap. 10, which writ shall be directed unto the justices of assize to enquire of the conspiracy; and the writ shall be such:

"The King to his beloved and faithful W. of S. and his companions, etc., assigned greeting: whereas among other articles which Lord Edward formerly king of England our grandfather granted for the amendment of the estate of his people, it is ordained, that of conspirators, false informers, (etc., following the substance of the statute)-as in the articles aforesaid is more fully contained: We, willing that the said articles in all things to be inviolably observed, command you that having looked into the ordinance aforesaid, you further willingly do, at the prosecution of all and singular persons complaining before you, that, which according to the form of the ordinance aforesaid shall be fit to be done. Witness, etc.

"And upon that he shall have an alias and pluries, and attachment against the mayor or sheriff, etc., if they do not according to the writ sent unto them, or return the cause why they cannot do the same; and it seemeth reasonable that the party in prison should have an action upon that statute against the recognizor, if he find him not bread and water in prison, etc., according to the statute."

De Natura Brevium, (9 Ed., 1762), f. 116.

No case is cited referring to the statute, and there is



Note 3. (p. 10) Of this statute Fitzherbert says: "There is also another writ of conspiracy which is given upon the statute called Articuli super Chartas, 13 Ed. 1, cap. 10, which writ shall be directed unto the Justices of Assize to enquire of the conspiracy; and the writ shall be such:

"The King to his beloved and faithful W. of C. and his companions, etc. assigned greeting: whereas among other articles which Lord Edward formerly king of England our grandfather granted for the amendment of the estate of his people, it is ordained, that of conspirators, false informers, (etc. following the substance of the statute) as in the articles aforesaid is more fully contained: We, willing that the said articles in all things to be inviolably observed, command you that having looked into the ordinance aforesaid, you further willingly do, at the prosecution of all and singular persons complaining before you, that, which according to the form of the ordinance aforesaid shall be fit to be done. Witness, etc.

"And upon that he shall have an alias and pluries, and attachment against the mayor or sheriff, etc., if they do not according to the writ sent unto them, or return the cause why they cannot do the same: and it seemeth reasonable that the party in prison should have an action upon that statute against the recognisor, if he find him not bread and water in prison, etc., according to the statute."

De Stat re Brevis, (9 Ed., 1703) p. 116.

No case is cited referring to the statute, and there is



## NOTES (8)

nothing to show the manner in which it operated in practice. Its importance, if it ever had any, was doubtless destroyed by the dominance of the civil action of conspiracy. After this had been displaced by the action on the case, suits for damages caused by false accusations, etc., were brought in the more flexible proceeding, while prosecutions for conspiracy were begun by indictment or information. Thus the older procedure, which partook of the nature both of a civil and of a criminal remedy, was left no sphere in which it could operate.





# NOTES

Note 1. (p. 11) Upon November 27, 1280 (2 Ed. 3) <sup>(a)</sup> a statute was passed extending the criminal remedy for treason. This act will be discussed presently. Fourteen years later (A.D. 1344), <sup>(b)</sup> it was declared that writs should be awarded against "conspirators, confederators and maintainers of false charters." In the seventh year of Henry 3, <sup>(c)</sup> the civil remedy was improved by an act directing that, on account of the frequency of prosecutions by conspirators for falsities alleged to have committed "in a place where there is none such," justices shall notice ex officio whether there is any such place as that named in the appeal or indictment; and if not, the process shall be void, the accused shall have writs of conspiracy against their "indicators, procurers and conspirators," and there shall be also punished by imprisonment, fine and ransom for the benefit of the King. This act was continued by St. 9 Hen. 3, St. 1, (A.D. 1421), and made perpetual by St. 18 Hen. 3, c. 12 (A.D. 1498).

By St. 3 Hen. cap. 1 (A.D. 1427), reciting that many people are falsely indicted by conspirators, the time within which a capias is returnable and an exigent awarded is extended, and the capias is issued to the sheriff of the county in which the crime was alleged to be committed, as well as to the sheriff of the county in which the accused resides.

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(a) St. 4 Ed. 3, cap. 11; 1 St. at L. (Huffhead) p. 204.

(b) St. 18 Ed. 3, Stat. 1.

(c) St. 7 Hen. 3; 1 St. at L. 510.



## NOTES (6)

Finally, by Stat. 3 Hen. 6, cap. 10 (A.D. 1456), reciting that many persons are falsely accused of felony in a county or franchise other than that in which they reside, and outlawed, further safeguards in the way of notice and delay before exigents shall issue are provided, and persons acquitted upon such prosecutions are given an action upon the case against the procurers of such indictments and allowed to recover treble damages.



Note 7. (p. 11) The contrary view is taken by Bushman, J., in the great American case upon conspiracy, *State vs. Bushman et al.*, 5 H. and J. (Md.) 317, decided in 1821. Speaking of the Definition of Conspirators, 33 Edw. 1, he says: (p. 337), "It is equally clear, that the statute does not embrace all the ground covered by the common law. Who doubts, or was it ever questioned, that a conspiracy to commit any felony is an indictable offense; as to rob or murder, to commit a rape burglary or arson, etc., or a misdemeanor, as to cheat by false public tokens, etc?...Yet such cases of conspiracy are not made punishable by any statute, and are only indictable at common law; which could not be, if the statute 33 Edw. 1, either furnished a definition of all the conspiracies indictable at common law, or restricted and abridged the latter, by rendering punishable, all such as it does not define. The statute, therefore, must be considered either as declaratory of the common law only, so far as it goes, for the purpose of removing doubts and difficulties which may have existed in relation to the conspiracies it enumerates, by giving them a particular and definite description: or as superadding them to other classes of conspiracy already known to the common law, leaving the common law in possession of all the ground it occupied beyond the provisions of the statute. And so it has been uniformly understood in England, from the earliest down to the latest decision that is to be found on the subject; otherwise the Judges could not have sustained a great proportion of the prosecutions for conspiracy, with which the books



are crowded; in some of which the objection, that the matter charged was not within the statute 33 Ed. I, was made and overruled, as will be hereafter shown".

It will be noted that the phrase "common law" may be understood in two senses. It may refer to the customary law existing before the Definition of Conspirators, or it may mean the entire body of principles developed and applied by the courts at any one period. Now Judge Buchanan is right in saying that conspiracy is largely of common law origin, understanding the term in the second of these senses. But this does not commit us to the position that the Definition of 33 Ed. I covered only a part of what was known to be law in regard to conspiracy at that time. The unsoundness of this opinion appears almost beyond question when we examine what evidence has been preserved to us. As the cases increased and other conspiracies than those to enter false accusations were brought before the courts, the judges extended the law to embrace them. But this was clearly a process of judicial legislation, as appears from the manner in which this extension took place. (See post.) Thus there was developed a supplementary body of unwritten law that soon outstripped the statutes, and furnished ample authority to support Judge Buchanan's decision in the case under discussion. It did not make any real difference, therefore, in this case whether the Edwardian Statutes did or did not embody all the law then relating to conspiracy. Indeed, all that Judge Buchanan needed to hold, in any event, was that the Definition did so render "dispunishable" all combinations except those which it mentions.





Note 3. (p.12) Wright, in his monograph entitled "The Law of Criminal Conspiracies and Abominations," says (p.3): "There appears to be no evidence that, during the first of these periods (1100-1300), any other crime of conspiracy or combination was known to the common law than that which was authoritatively and "finally" defined in A.D. 1305 by the ordinance of Conspirators, 35 Ed. 1, as consisting in confederacy or alliance for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds." This statement is substantially true, though<sup>a</sup> tendency to broaden the offense appears during this period.

Mr. Justice Wright, however, is in error in his opinion that "even the civil writ of conspiracy appears not to have been extended until the 17th century to all matters beyond the purview of the 35 Edw. I." (W. p.12). On the contrary, as is shown in Chap. 3 of the present study, as early as the reign of King Edward III, action was entertained for several matters not within the statute, whereas by the 17th century it had been practically displaced by the new action on the case in the nature of a conspiracy.

We also give several reasons which he considers to be "nearly conclusive that the crime of conspiracy was created by statute, and that no such crime was known to the common law." Without taking these up in detail, we may state that they do not, in our opinion, sustain his contention. A careful examination of all the evidence at our disposal seems amply to justify the conclusion stated in the text: that the Edwardian Statutes merely gave definite and authoritative expression to



# NOTES (c)

a conception which was already given in the common law, and which retained its essential features for many years after the passage of these enactments.



Note 9. (p.12) This statement is not inconsistent with the undeniable truth that the principles governing both the civil and the criminal remedies for conspiracy were largely a product of judicial legislation. The statutes undoubtedly confined the law within too narrow limits (as judged according to our present notions); but it required elaboration and extension even within those limits. This is the task to which the courts devoted themselves for some years after the passage of the statutes; whereas, had there not been enacted, the judges might have been widening the general conception of conspiracy, leaving for a future time the settlement of its details.



## NOTES

### CHAPTER II

Note 1 (p. 13)        The following description of the old strict action of conspiracy is based upon a personal examination of sixty odd conspiracy cases in the Year Books of the period between the reign of Edward II and that of Henry VIII. I have thought it best, however, not to encumber the text with specific references, except in a few instances, to the individual cases. These can be found in *S.N.D.*, T. 146.





Note 1 (p. 18)      The Definition of Conspiracy, as we have seen, was confined to its literal and historical combinations to pervert justice.

In the Year Book for the fortieth year of King Edward III (A.D. 1366) we find a case wherein an action of conspiracy was allowed for a combination to deprive the plaintiffs in the exercise of their right of advowson. The defendants had made a false letter purporting to be signed by the plaintiffs requesting the bishop to receive a certain clerk. This clerk was accordingly presented and inducted, and the plaintiffs were thus prevented from appointing their own clerk until they had brought a quare impedit and recovered their presentation. The court said that "for such false understandings, deceits, or conspiracies the action of conspiracy lies." (P. 40 Edward III, f. 19)

Two years later a similar action was entertained for a conspiracy to procure a disseisin and reoffment resulting in a loss of warranty. In the same year an action was brought for a conspiracy to enter an action of novel disseisin in the name of the now plaintiff, wherein the defendant had pleaded that the plaintiff was a villein and the court had decided accordingly - in other words, for a conspiracy to deprive the plaintiff of his liberty and reduce him to villenage.



## NOTES (2)

The court held that the writ of conspiracy would lie, for if such falsity were not punished, any freeman might be made a villain in the same violent manner. (2. 42 Edward III, f. 1; P. 42 Edward III, f. 14).

There is some ground for believing that a writ of conspiracy would lie for combinations to forge false deeds and offer them in evidence, whereby the plaintiff lost his case; also for a conspiracy to cause a false office to be found of the plaintiff's land. (2. 39 Edward III, 13; 46 Edward III, f. 20; 27 Lib. Ass. 73).

Not only the civil courts, but the criminal courts as well, took cognizance of various combinations of like nature. (26 Lib. Ass. 131; 27 Lib. Ass. 74, 73).

None of the above wrongs fell within the field of the matured form of the action of conspiracy, and most of them were beyond the operation of the Definition of Conspirators.



## N O T E

Note 3 (p. 18)            The following is the form of writ prescribed by the Ordinance of Ed Edward I: "The King to the Sheriff, Greeting. We command you that if A. de B. shall give you security for prosecuting his plaint, then place under sure and safe pledges C. de D. that he be before us in octabis sancti Joh' Baptiste, wheresoever in England we shall be, to answer the said A. for his plea of conspiracy and transgression, according to our ordinance lately therupon provided, according as the said A. may reasonably show that he ought to answer to him for it, and have there the names of the pledges and this writ. Teste, etc."

The above language in no way describes the wrong to be redressed beyond calling it a conspiracy. The plaintiff might accordingly sue out his writ of conspiracy, and then "count" upon almost any kind of injury done him by a combination of persons. The court was thus left an unbounded discretion in determining whether the wrong complained of was a conspiracy under the Statutes or according to the general principles of the common law. This consideration probably accounts for the



extensions which the action of conspiracy received during the period under discussion.

It may have been this very disposition of the courts freely to extend the remedy, whereby reason and justice seemed to demand it that contributed to cause the writ of conspiracy to become more definite in its description of the tort to be redressed. All we can say with assurance, however, is that exceptional cases like the above are no longer met with after the reign of King Edward III, and that by the time of the compilation of the Register Britius and of the De Natura Brevium (Fitzherbert), the writ of conspiracy had become differentiated into a number of distinct forms, each applicable to a single group of circumstances under which the action of conspiracy would lie.





# NOTES

Note 4 (p. 13) We ought <sup>not</sup> to be surprised at seeing the defects of the action of common law rendered harmless in this roundabout fashion. It would have been utterly repugnant to the traditions of the early law for the courts openly to have changed the principles governing the older remedy. The characteristic method of legal development, in England as elsewhere, has always been to mask a change in the essentials of the law under a nominal adherence to its letter. Hence, in quietly broadening the legal remedy for false and malicious prosecutions through the agency of a supplementary form of action which apparently left the older remedy untouched while really undermining its very foundation, the English courts were merely giving a special illustration of the manner in which legal fictions, equitable remedies, and the like, come into being.



## NOTES

Page 8 (p. 18)            The "action upon the case" had its origin in Chapter 24 of the Statute of Westminster 2, passed in the thirteenth year of the reign of King Edward I (A.D. 1285). Before this Statute, when a person wished to bring an action for damages for some legal injury done him, he was obliged to show that the facts of his case could be comprehended within one or more of the formal, authoritative "original" writs contained in the Register. If this were impossible, he must appeal to the Chancellor or go without remedy altogether; for only Parliament could change or create an original writ. In the growing volume of litigation, however, more and more cases appeared which were not covered by already existing original writs, but which obviously called for redress. Accordingly the above statute provided as follows:- "And whenever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case (in consimili casu) falling under like law, and requiring like remedy, is found none, the clerks of the Chancery shall agree in making the writ."..... Such writs were held to no strict form, but were framed to fit the circumstances of specific cases. Actions begun by means of these



## NOTES (5)

special individual writs were known as "actions upon the case", and were soon extended to numerous wrongs hitherto not legally remediable. The operation and value of this new remedy are strikingly illustrated in the history of the action upon the case "in the nature of a conspiracy."



Note 6 (p. 18) Lord Holt seems to claim for the action upon the case in the nature of a conspiracy a much earlier beginning than this. Speaking of several earlier cases, among them of two or three decided during the reign of King Edward III, he says: "These actions of conspiracy in the old books were really but actions upon the case: but conspiracy properly so-called does not lie unless the party were convicted of a capital crime", etc. (Savile vs. Roberis, 12 Mod. 109). This remark holds true of some of the cases which he cites; but it is not applicable to the abnormal cases of conspiracy reported in the reign of Edward III, of which mention has been made. It is improper to speak of these as actions upon the case. The statement implies an anachronism. At that period the strict action of conspiracy was in a formative stage. The limits of that remedy were so indistinct and shifting (owing, as we have seen, to the vague and general phraseology of the writ of conspiracy) that redress could readily be afforded to exceptional cases without violence to any of the principles relating to the action of conspiracy. Not until these had hardened into the set forms of a later period was it necessary that an action upon the case be employed to redress "conspiciles casus". At the time of Edward III, the conditions that gave rise to the action upon the case in the nature of a conspiracy had not yet come into existence.





# NOTES

Note 7 (p. 13)      Thus, in Smith vs. Cranchaw, 1 Jones 93, (1 Car. 1 - A.D. 1625), the court says: "There are two writs of conspiracy: the one the writ of conspiracy in the Register, and the other is an action in the case, and if a man brings writ of conspiracy mentioned in the Register, he should be indicted and acquitted, and if he is not acquitted no action lies. There must be a conspiracy, hence, writ of conspiracy does not lie against one, for one cannot conspire alone, for the writ of conspiracy having a precise form cannot be extended beyond the form". But the action upon the case, the court continues, is framed as the matter requires, and is not confined to any strict form. Hence, it lies against one person, and upon a mere ignoramus. The purpose of this contrast is clearly to enable the court to establish the broader principles applicable to the action upon the case without contravening the current doctrines regarding the action of conspiracy. There are similar comparisons between the two forms of action, and for a like purpose, in Savile vs. Roberts, (12 Mod. 209). and Jones vs. Gwynn, (10 Mod. 148, 214)



## NOTES

Note 3 (p. 19)      The availability of the action upon the case against a single defendant was the feature which first attracted notice. At first there was a tendency for the courts to hold that actions upon the case would lie against one defendant only when the crime charged had been a trespass. For malicious indictments of felony, it was thought, the action of conspiracy would furnish the only redress. Thus, in Shotbolt's Case, Godh. 76, (28 - 29 Eliz.-A.D. 1586-7). Chenue, J., said that "such a conspiracy which is grounded upon an indictment of felony must be against two at the least, for the same is an action grounded upon the common law." This distinction, however, soon disappeared. The case of Knight vs. German, Pro. Pl. 70; 134, decided during the same reign (29 and 31 Elizabeth - A.D. 1587 and 1589) was grounded upon a false indictment of felony, and a single defendant was made to plead propter causam. Lord Coke said: "The words here, and in a conspiracy, are all one; and as a writ of conspiracy lieth against two, so here (case lieth) against one." This is the doctrine of the later cases. The books record an increasing number of actions upon the case against single defendants wherein the wrongs complained of would lay supported actions of conspiracy had there been



perpetrated by a combination of persons. The true principle was broadly stated in Exile vs. Holzer, and held its place until the decay of the action of conspiracy. From now, there is all practical importance.



# NOTES

Note 2 (p. 19) Here again the courts of first showed a disposition to narrow the operation of the general principle. It was intimated in Law vs. Beardmore, T. Rayn. 155 (17 Car. 2 - A.D. 1603) that an indictment for a bare trespass is not actionable; "but where the matter of the indictment is scandalous, or cause of corporal punishment, there (an action) lieth." Three cases decided in the twenty first year of Charles II (A.D. 1669) - Skinner vs. Ganton, 21 Feb. 477, wherein the plaintiff had been arrested and imprisoned in a false civil action of debt; Price vs. Crofts et al., T. Rayn. 160, arising out of a false indictment for barratry; and Henly vs. Hurstall, 1 Vent. 23, 25, (21 Car. 2 - A.D. 1669), in which the cause of action was an indictment against a justice of the peace for rescuing a sure-bond out of the hands of the constable who had brought the latter before him - all these were within the limitation of Law vs. Beardmore. This limitation, however, was soon exceeded. In Norris vs. Palmer, 2 Mod. 51 (confirmed in Anon., 2 Mod. 304, 30 Car. 2 - A.D. 1678), the plaintiff was allowed to recover in an action for a malicious indictment for a common trespass involving no scandal - the asportation of one hundred bricks.

The point was fully discussed in Exile vs. Exile, 12 Mod. 108. The plaintiff had been maliciously and falsely indicted for a riot. Lord Holt expressly over-ruled the doctrine that an action would not lie for a false indictment for a trespass unless the charge involved scandal, and gave judgment for





## N O T E S (1)

the plaintiff. This decision was fully examined and confirmed in Jones vs. Bryan, 10 Mod. 211 (13 Anne - A.D. 1713), wherein an action had been brought upon a false and malicious prosecution for exercising without a licence the trade of a "door-knocker". Premising that the ground of the action was the expense to which the plaintiff had been put to defend himself from the false charge, the court said that the damage was as great whether the charge was scandalous or not, and the malice also as great or greater. "If scandal be mentioned, it is only mentioned in the nature of damages." This is the modern doctrine.



## NOTES

Notes 14 (p. 19)      The early practice of permitting the defendant in an action of debt to be arrested at the beginning of the suit and held in prison unless he was able to give bail to appear in court and satisfy any judgment that might be rendered against him opened abundant opportunities for false and malicious proceedings for which the allowance of costs was not an adequate redress. Accordingly, during the reign of Charles II, actions upon the case for the damages caused by such malicious civil suits came to be allowed. The first of them reported is Skinner vs. Gunton, 3 Raym. 176, 2 Keb. 473 (21 Car. 2 - A.D. 1669). A typical case is Daw vs. Swaine, 1 Sid. 344, decided the same year. Swaine had falsely and maliciously affirmed to the Sheriff of Middlesex that Daw owed him one thousand pounds, and caused bail to be given accordingly, whereas the debt really amounted to only forty pounds. Daw had been unable to secure such large bail, and had consequently been kept in goal for several days. He was allowed to recover a judgment against Swaine in an action upon the case; "Damages," the court said, "as had special damages from such false parlance." See also Lockington vs. Weston et al., 1 Sid. 443 (12 Car. 2, A.D. 1660), Webster vs. Wight, 2 Lev. 210, (32-33 Car. 2 - A.D. 1664), and Bird vs. Line, Comyns 190 (8 Anne - A.D. 1709). During the reigns of William III and Anne it was thought that such an act-



## N O T E S (10)

ion would be only in case the plaintiff could show that he had been held to excessive or "special" bail. See Deal vs. Spanton, 12 Mod. 237 (10 W. 3 - A.D. 1696); Robins vs. Robins, 12 Mod. 273 (11 W. 3 - A.D. - 1698); Parker vs. Langdon, 10 Mod. 145, 150 (11-12 Anne - A.D. 1712-3). In Goslin vs. Wilcock, 2 Wils. 108 (6 George I - A.D. 1735), however, the plaintiff was allowed to recover in an action for a false arrest in a malicious civil suit, without any allegation that he had been held to excessive bail. This decision was perfectly proper. Excessive bail is only an evidence of malice or of damages; and if those can be proved by other facts, the necessities of the action are satisfied.



Note 11 (p. 19) This doctrine dates from the case of Layton vs. Mill, Cro. Car. 191 (3 Car. 1 - A.D. 1631), where it was held that an action upon the case would lie against the apparitor of a bishop for maliciously causing a man to be cited to the consistory court upon a groundless suspicion of incontinence. The reasons for allowing such actions were the same with those given in support of actions for false and malicious civil suits: the malice of the defendant, and the costs which the plaintiff had incurred in repelling the charge. See Hooking vs. Hathow et al., 1 Sid. 483 (28 Car. 2 - A.D. 1670); Grey vs. Legge, T. Jones 132 (31-32 Car. 2 - A.D. 1679-80).

An action would lie for a false charge of an ecclesiastical offense only in case the court before which it had been preferred had had jurisdiction over the offense. Thus, in Bowler vs. Painter, 2 Bulst. 343 (5 Car. 1 - A.D. 1633), an action for an attempt to charge the plaintiff as quarter session with being the father of a bawling child was disallowed, because scandals of this kind were properly cognizable in the spiritual, not in the secular courts.





Note 12 (p. 19) In Lovett vs. Fulkner, 2 Bulst. 122 (21 Jac. 1 - A.D. 1613) an action upon the case was brought for a false and malicious accusation of treason. The court inclined against entertaining it. "Every one," they said, "by his oath of allegiance is bound to discover treason, and to have one punished for this by an action upon the case in the nature of a writ of conspiracy to be brought against him would be very hard." The case, however, went off upon the point that the false accusation had been preferred before a court without jurisdiction to try it. The question was settled in the great case of Smith vs. Bradshaw, 3 Bulst. 270, 1 Jones 21, and other reports. (20 Jac. 1, 1 Car. 1 - A.D. 1622, 1625), wherein the court held, after listening to several re-arguments, that an action would lie for a false and malicious charge of speaking treasonable words, and that as to this there was no diversity between a conspiracy to indict of treason and a conspiracy to indict of a felony.



# NOTES

Note 13 (p. 20)      The first suggestion of this principle is to be found in the case of Bradenbury vs. Helling, decided anno 16 El. (A.D. 1574), Cro. Jac. 7. The court said that although an action of conspiracy would not lie upon an ignoramus found, an indictment for the conspiracy would lie at the common law. This distinction was adhered to when actions upon the case came into general use. Thus, in Barnes vs. Constantine, Yelv. 46 (2 Jac. 1, A.D. 1604), there is an exoner dictum that "this action is but for damages for a slander, which well lies ..... if a bill is offered and an ignoramus found." This statement was confirmed in the Polliver's Case, 9 Co. 56 b. six years later. The court said: "And it is true that a writ of conspiracy lies not, unless the party is indicted and legitimatus ad quietandum, for so are the words of the writ." And they upheld an action upon the case for a false accusation of robbery whereon the grand jury had found ignoramus. Some doubt was thrown upon this doctrine in Lowst vs. Faulkner, 2 Bulst. 270 (11 Jac. 1, A.D. 1613), and was abolished by the court during the first argument of Smith vs. Granshaw, Palm. 313, (1 Car. 1 - A.D. 1625). The final decision of the latter case, however, so firmly established the doctrine that it was never afterwards shaken. See Lynn vs. Porter, Cro. Jac. 430, (16 Jac. - A.D. 1616); Pollard vs. Evans, 1 Show. 12 (31 Car. - A.D. 1629).



# NOTES (13)

In Coddard vs. Smith, 8 Mod. 211 (3 Anne - A.D. 1704), the court seemed clearly opposed to extending it to a case where in the plaintiff could show only a holla prosequi; but no decision was rendered.

In Exile vs. Roberts, 12 Mod. 203, 211, (10 W. 3, A.D. 1698) Lord Holt was inclined to think that an action could not be maintained upon an ignoramus unless the charge involved scandal. This qualification, however, was not adhered to in Jones vs. Gwynn, 10 Mod. 214 (12 Anne - A.D. 1713), which contains a final statement of the law upon this point. The principle under discussion was unequivocally laid down as authoritative, upon the reason suggested in the Poulterers' Case and more fully explained in Smith vs. Braithwaite. "Conspiracy," concludes Parker, C. J., "lies not without acquittal, and the reason of this, and the only one, is, because this is a formal action, and the form of the writ in the Register is so..... There is certainly no argument from an action which is a formal one, for which there is a formal writ in the Register, to an action upon the case, that is tied down to no form at all. If an action upon the case be brought upon an indictment, where the jury find ignoramus, there is no possibility that there can be an acquittal."



# N O T E S

Note 14 (p. 20)      The first statement that an action would lie for a malicious prosecution upon a defective indictment is found in an obiter dictum in Barnes vs. Constaing, Yelv. 16, (2 Jac. 1 - A.D. 1604). It was repeated as part of the ratio decidendi in Smithson vs. Syson et al., 1 Keb. 141 (25 Mar. 2 - A.D. 1673), and confirmed in a note to Palmer vs. Barrett, 1 Lord Raym 81 (6 W. 3 - A.D. 1696). Lord Holt, in Savile vs. Roberts, remarked obiter that such an action grounded upon an erroneous indictment would lie for the slander and injury to the plaintiff's good name; sed aliter when the indictment "contains crime without slander", as in forcible entry. The doubt suggested in Goddard vs. Smith, 6 Mod. 251 (3 Anne - A.D. 1704) seems applicable to the former action of conspiracy.

The law upon this matter was finally settled, however, in Jones vs. Gwynn, 16 Mod. 214 (12 Anne - A.D. 1715). The plaintiff had been indicted for exercising without a license the trade of a "corn-badger". The prosecution failed because this was not an indictable offense. The court held that an action of conspiracy could not be sustained upon these facts, but that an action upon the case might, since the gist of such an action is malice and damages. "It is to be considered," says Parker, C. J., (217), "that the grounds of this action are, on the plaintiff's side, innocence, and on the defendant's side malice.....





#### NOTES (14)

And as the plaintiff is equally damaged by an insufficient as sufficient indictment, so the malice of the defendant is not at all less because the matter was not indictable; nay, it is rather an aggravation." Nor is there any reason, he continues, for making a difference, when the matter of the indictment is scandalous and when not. Judgment was accordingly given for the plaintiff. This decision has been followed in the later cases. As was said in Chambers vs. Robinson, 1 Stra. 591 (12 George I - A.D. 1726) "a bad indictment (serves) all the purposes of malice, by putting the party to expense, and exposing him, but it serves to no purpose of Justice in bringing the party to punishment if he be guilty". See also, Wickes vs. Fenton et al., 4 T. R. 247, (21 George III - A.D. 1760).



## NOTES

note 15 (p. 20)      An action of conspiracy would not lie unless the alleged false and malicious prosecution has been before a court of competent jurisdiction. This principle was at first held applicable to actions upon the case, and the declaration was required to disclose upon its face the competence of the tribunal in which the charge had been tried. See Throgmorton's Case, Bro. El. 563 (39 El. - A.D. 1597); Arundell vs. Trezona, Vely. 115, (5 Jac. 1 - A.D. 1607); Lovel vs. Faulmer, 2 Bulst. 270 (11 Jac. 1 - A.D. 1613); Anon, Styles 374, (A.D. 1653). In time, however, the strictness of the rule began to relax. In Taylor and Towlin's Case, Godb. 444, decided anno 4 Car. 1 (A.D. 1628), a bill of conspiracy for a false indictment for rape<sup>128</sup> entertained by the Court of Star Chamber, although the jurisdiction of the court in which the charge had been prosecuted was not distinctly alleged. The court at first was inclined to think this a good exception. "But afterwards," we are told, "upon view of the Bill, because the conspiracy was the principal thing tryable and examinable in this court, and that was well laid in the Bill, the bill was retayed, and the court proceeded to sentence."

Actions for malicious prosecution upon common law justice were not long in finding their way into the common law courts. In 1683 the case of Atwood vs. Rogers, Styles 376, arose out of a false presentment before the conservators of the River Thames for



# NOTES (13)

suffering some loads of dirt to fall into the river. After verdict for the plaintiff, the defendant moved in arrest of judgment on the ground that the record did not disclose the authority of the conservators to receive presentments. The court said, however, that an action lies "for bringing an appeal against one in the common pleas, though it be coram non iudice, by reason of the vexation of the party, and so it is all one whether there were any jurisdiction or no, for the plaintiff is prejudiced by the vexation, and the conservators took upon them authority to take the presentment."

The principle that an action might lie for a false and malicious civil suit before a court without jurisdiction was stated obiter in Temple vs. Killingsworth, 12 Mod. 4 (3 W. and M. - A.D. 1691), and in Jones vs. Hyman, 12 Mod. 214, 219, 220 (12 Anne, A.D. 1713). It becomes part of the ratio decidendi in Goslin vs. Wilcock, 3 Wils. 302 (4 George III - A.D. 1768). Wilcock had caused the arrest of Goslin upon a false and malicious civil action in the court for the Borough of Bridgewater. It was shown that the court at Taunton had jurisdiction of the case, but that Wilcock had caused Goslin to be arrested at Bridgewater because he (Goslin) had a stall at the fair at that place. After verdict for Goslin in an action upon the case grounded upon the above facts, Wilcock moved for a new



## N O T E S (15)

trial; but the court said: "If you hold a man to bail in an inferior court when you know it hath not jurisdiction, and with malice, an action will lie; that though it was somewhat doubtful but that the declaration who it have alleged that the defendant knew he had no cause of action in the jurisdiction of Bridgewater.....yet justice and equity being on the side of the plaintiff, a new trial would be refused."

It has always been necessary, however, for the plaintiff in an action for a malicious prosecution to show that the prosecution is at an end: "otherwise, he might recover in the action, and yet be afterwards convicted on the original prosecution!" Fisher vs. Eristow, 1 Dougl. 418 (19 G. 3 - A.D. 1798). See also, Glasenr vs. Hurlstone, Gouldso. 51 (29 El. A.D 1567); Shotboldt's Case, 10 B. 76 (2 E. - 3 El. - A.D 1387); Throton's Case, Cro. El. 805 (39 El. - A.D 1597); Arundell vs. Tregonoe, Vely. 118, (3 Jac. A.D 1607); Chimney vs. Cannon, 2 Keb. 473 (21 Car. 1 - A. D. 1629); Parker vs. Langley, 10 Mod. 148, 110 (12 - 13 Anne - A.D.1713); Lewis vs. Farwell, 1 Huds. 114 (5 George I - A.D. 1719); Morgan vs. Hughes, 1 T. R. 335 (28 George III - A.D. 1788)





# NOTES

Page 14 (p. 10) The evolution of the doctrine of malicious cause is interesting. In Arden v. Correll, 3 Leon. 143, 144, (26 Elizabeth - A.D. 1588), Salusbury, Chief Justice, states that no action lies for any "slandering or defaming, if no corruption or malice be in the party who prosecutes the suit". In Elkist v. German, Cro. Eliz. 70, (29, 31 Elizabeth - A.D. 1587, 1589) the court held that no suit can be brought upon a false indictment of felony in cases where "the indictment is preferred by the party grieved, and as permitted according to law". But the defendant should plead that he "did it upon good presumption", else, "everyone shall be in danger of his life by such malicious practices."

During the reign of Queen Elizabeth and King James I, it was several times decided that a good "ground of suspicion" constituted a sufficient justification for having preferred a false indictment. (See Pain vs. Rochester, Cro. Eliz. 171; Cambers vs. Taylor, Ill. 900; Weele vs. Wells, 3 Bulst. 264). Thus, the finding by the plaintiff of goods stolen from him in the hands of the defendant was held a good defense, (Anon., Where 600), likewise the plea of a father sued for a false charge of rape the he had believed and acted upon the statement of his young daughter. (Cox vs. Wirrell, Cro. Jac. 193).

In Ashley's Case, 12 Co. 60, (9 Jac. 1, A.D. 1611) the Court of Star Chamber enumerated the elements which must concur in order that the defendant is malicious prosecution might



justify upon the ground of a "good cause of suspicion". (1) A felony must have been committed. (2) The arrestor must plead suspicion upon good cause, which is traversible. (3) The party who pleads suspicion must actually have arrested the plaintiff. We cannot command another to do so, since suspicion is purely personal. Common voice and rumor were said to be sufficient grounds of suspicion.

In Payn vs. Porter, Cro. Jac. 490 (16 Jac. I - A.D. 1618), the Court of Exchequer recognized that "the exhibiting the bill upon true and just presumptions is excusable." See also Carlson vs. Will, Cro. Car. 291, (8 Car. I - A.D. 1632) - "groundless suspicion"; Lockin vs. Mathew et al., 1 Sid. 407 (22 Car. 2 - A.D. 1670) - "without any cause."

The term "probable cause" seems to be employed for the first time in Atwood vs. Morger, Styles 378, (A.D. 1683). There the court said: "And I hold that an action on the case will lye, for maliciously bringing an action against him where he had no probable cause," etc. The term reappears in the argument of Bemberton, Sergeant, in Norris vs. Palmer, 2 Mod. 51 (27 Car. 2 - A.D. 1675). It was adopted generally by the courts, and the conception denoted by it refined in the later decisions.

Until the case of Naville vs. Roberts had been decided, the practice was for defendants to plead probable cause as their justification. After that decision, however, it became in-



NOTE (16)

current open the plaintiff to allege and prove affirmatively the absence of probable cause in the defendant, since the allegation would be held had upon demurrer. This is the modern practice.



Note 17 (p. 21) This idea is at the foundation of the early statutes and cases. The gist of the civil action of conspiracy was the combination. No judgment could be pronounced against the defendants unless at least two were found guilty. The action had to be brought in the county in which the combination had been formed, not where the false indictment had been preferred and discharged, the reason being that the conspiracy was the "root of the fact", and acts in execution of it were "only consequences following upon this", or "matters of aggravation". During the reign of Richard II, it was even said that one "might have a writ of conspiracy although they (the defendants) did nothing but the confederacy together, and may recover damages." (Bellewes Cases, Temp. Richard II)

In Cockshill vs. Mayor of Bolton, 1 Leon. r. 149, 1. 269, (31 Elizabeth - A.D. 1569), the plaintiff brought suit against the mayor, town clerks, and goaler of Bolton for a conspiracy to delay him in recovering in an action of debt by allowing the debtor to go free without bail. It was objected by the defendants that the taking of bail is a judicial act, and can therefore give rise to no action, but the court entertained the suit, "for the not taking bail is not the cause of the action, but the conspiracy." And when the attempt was made later on to find a reliable means of distinguishing the action of conspiracy from the action upon the case of the recovery of a conspiracy





and, one of the methods employed was to determine whether the conspiracy was the ground of action, or whether the conspiracy was placed upon the acts done and the conspiracy continued by way of aggravation.



## N O T E S

Note 14 (p. 22)      Thus, Chapter 12 of the Statute of Westminster 2 (13 Ed. 1, A.D. 1285) provides a remedy for malicious appeals. The Ordinance of Conspirators is directed against those who "procure pleas maliciously to be moved", and those who "maliciously maintain and sustain" such pleas. Statute 33 Ed. 1 defines conspirators as "they that do confeder or bind themselves.....falsely and maliciously to indict or cause to be indicted....and such as retain men for to maintain their malicious interprises", etc. And there are other statutes and cases at this period which aim to punish various injuries inflicted with malice.



## NOTES

Note 19 (p. 23) Even in their treatment of actions upon the case wherein the right of the plaintiff to recover was based upon malice and damages, the courts at first exhibited a tendency to repeat the process of erecting into fundamental conditions for redress circumstances which were really but particular evidences of malice or measures of damages.---the same process whereby the action of conspiracy had become invested with its stiff and contracted character. Manifestations of this tendency are seen in the earlier holdings that an action upon the case for a false and malicious accusation of a trespass, or for a malicious prosecution upon a defective indictment or before a court without jurisdiction to conduct the prosecution, or for a malicious accusation whereupon the grand jury had found an ignoramus, would not lie except in cases in which the charge involved slander or the plaintiff had suffered corporal injury or imprisonment. Of the same nature was the principle at first announced that an action for a false and malicious proceeding in the civil courts would lie only in cases in which the plaintiff had been held to excessive bail. Fortunately, the number and variety of the cases compelled the courts to abandon these principles before the latter had become firmly established, and finally led them to adopt that general view of the nature of malice which has survived.



# NOTES

Note 20 (p. 25)      The term "malice" occurs but twice in the Year Books for this period, and in both these instances in which mention of it is made, no especial significance is attached to it. (P. 17 Edward II, f. 344; 13 Edward II - Fitzherbert, f. 222, pl. 23.) In the "Articles inquired of by Inquest of Office," 27 Edward III (27 Lib. Ass. c. 44), conspirators are said to be those who combine and agree "that each will aid and sustain the enterprise of the other, be it false or true; and who falsely have people indicted and acquitted, or falsely move or maintain pleas." Here, so completely has the conception of malice received expression in the current principles relating to the action of conspiracy that even the term is lost.





## NOTES

Note 21 (p. 24)      Indictors, or members of the grand jury which found the indictment against the plaintiff, enjoyed an absolute protection from action or prosecution for conspiracy. (13 Edward II, 401; 21 Edward III, 17 (4); 47 Edward III, 16, 17; 30 Lib. Ass. 21; 7 Henry IV, 31.) It was said that "they cannot be adjudged conspirators, because they are affirmed by their oaths" (27 Lib. Ass. 12; 9 Henry IV, 9); and again, "the law understands, when a man is sworn, that he will do according to his conscience" (27 Henry 3, 2). In the 27th year of Edward III, a witness sought to claim immunity upon the same ground. (27 Lib. Ass. 11.) He pleaded that he was sworn to inform the jury, but his plea was disallowed. The qualified protection enjoyed by witnesses taking part in the false prosecution was founded, not upon their oath, but upon the fact that they were compellable by law to testify. (27 Henry 3, 2). In this respect they occupied the same position with primer trovers and participators in the hue and cry. (20 Henry 7, 11; 35 Henry 6, 14). Justices and other court officials could not be sued for what they might have done in open court and in the execution of their official duties, (47 Edward 3, 16, 17; 13 Edward 4, 10; 27 Lib. Ass. 13; 9 Henry 4, 9; 31 Edward 4, 67), because "the law will not admit proof against this reverence and violent presumption of law that a justice sworn to do justice will do injustice". (Plowd. vi. 240, 10 Co. 23)



# M A L I C E

Note 22 (p. 24)      The growing emphasis put upon malice as an essential element in malicious prosecutions can be traced in the following cases: Knox vs. Barron, Cro. El. 10, (31 El. - A.D. 1849); Miller vs. Feignbold and Bassett, Gond. 105, (Jac. 1 A.D.      ) wherein the court said that a conspiracy could be malicious as well as false, "else it is no conspiracy", wherefore malice should be proven; Dox vs. Wiffall, Cro. Jac. 154 (4 Jac. 1 - A.D. 1816), Poulterers' Case, 9 Co. 84 b. (3 Jac. 1 - A.D. 1810), note by Lord Coke; Pain vs. Porter, Cro. Jac. 490 (10 Jac. 1 - A.D. 1818); Smith vs. Braslaw, 1 Jones 93 (1 Car. 1 - A.D. 1835); Taylor and Towlin's Case, Godb. 444 (4 Car. 1 - A.D. 1835); Carlton vs. Mill, Cro. Car. 291 (5 Car. 1 - A.D. 1832); Atwood vs. Monger, Styles 378, (A.D. 1853); Norris vs. Palmer, 2 Mod. 61 (27 Car. 2 - A.D. 1875); Jaw vs. Swaine, 1 Sid. 424, 1 Lev. 375, (21 Car. 2 - A.D. 1869); Hockin vs. Mathew et al., 1 Sid. 463 (22 Car. 2 - A.D. 1880); Gray vs. Deane, T. Jones 152 (31 - 32 Car. 2 - A.D. 1880); Webster vs. Hall, 2 Ex. 40, (37 Car. 2 - A.D. 1884). An interesting extension of the idea as to the significance of malice in these actions is seen in Anon, 2 Mod. 106 (30 Car. 2 - A.D. 1875), arising out of an indictment for a common trespass. The court said that after acquittal of the trespass the indictment should be held malicious, since the defendant might have brought a civil action for his own recompense and hence had no reason to



## N O T E S (22)

indicated the possibility other than to put him to charges and leave him [?] free to the clerk of the assizes.

The above list comprises all the cases decided prior to Savile vs. Roberts in which malice had been expressly recognized as essential to recovery in actions for false proceedings.



# NOTES

Note 23 (p. 23)      Thus, the locality in which the two actions should be brought differed. An action of conspiracy was maintainable by the court having jurisdiction over the place in which the combination was formed; an action of, on the part, in the jurisdiction in which the malicious prosecution took place. So, too, the jury which tried an action of conspiracy had to be drawn from the several vicinages in which the conspiracy had been entered into and put into execution, whereas the jury in an action upon the case need come only from the vicinage in which the case was tried. It may be said generally, that in actions of this character for prosecutions alleged to have been instituted by a combination of persons, it would frequently happen that all the defendants but one would be acquitted, or the plaintiff would be unable to show that he had been acquitted upon the alleged false charge, or the like. The defendant would then move in arrest of judgment that the proceeding was an action of conspiracy and that he could not be held alone, etc. In such an event, the fate of the action depended upon which form of action the court held it to be; hence the importance of distinguishing between them with certainty.





## NOTES

ote 24 (p. 25) This note was first suggested in Smith vs. Branchaw, Pa. 312, (1 Car. 1 - A.D. 1843), an action upon the case for a false and malicious accusation of having uttered libellous words. The question had been raised whether the jury should be drawn from the county in which the conspiracy had been formed, or partly from that county and partly from the county in which the concerted design had been executed. Todd, J., believed "that the action will be brought and tried where the conspiracy, which is the root of the tort, is laid; for the others are only consequences following upon this". He held further that the damages "will be equal and entire, because the conspiracy is the cause, and all are found guilty together." Ley. C.J., agreed that "if the conspiracy only had been the offense, there the venue will be where the conspiracy is committed."

Skinner vs. Ganton, 7 Ray. 276, (1 Car. 1 - A.D. 1843), is a leading case in this connection. An action upon the case had been brought against three defendants for a conspiracy to <sup>the</sup> have the plaintiff arrested in a grand action of debt. Only one defendant being found guilty, his attorney argued in arrest of judgment that the proceeding was an action of conspiracy, wherein a single defendant cannot be held. A majority of the court held that it was an action upon the case, the reason being that "the substance of the action was the undue arresting



of the plaintiff, and not the conspiracy." (1 Saut. 127) The same idea is expressed in another report of the same case, (1 Vent. 12): "Here 'tis rather in the nature of an action upon the case, and the conspiracy alleged by way of aggravation". In still a third report, (3 Keb. 497), we are told, "The court said, the writs being the same, it's one or the other, as the plaintiff titles it, albeit the word conspiracy be used; and according to the offense, if felony conspiracy; if but trespass, action upon the case". Here the action was entitled "In placito transgressionis super casu". (1 Vent. 15). Three years later the case reappears, and it is laid down: "In placito transgressionis quod conspiraverunt or indictari procuraverunt, if trespass be the principal and this but for aggravation or damages, finding one guilty is sufficient, but in a mere conspiracy not, though no villainous judgment be given".

The above principles were discussed and reaffirmed in Rex vs. Thode, 3 Keb. III, (34 Car. 2 - A.D. 1672), in the following words: "In an action on the case for deceit, conspirations inde habita, one may be convicted alone, and where it is an action upon the case quod conspiraverunt, one alone cannot be convicted." In another report (1 Vent. 234) of this case we find that Wilk said, "The difference was, where the suit was upon conspiracy wherein the villainous judgment was to be given, and where the conspiracy is laid out by way of aggravation; as in this case." Hale said, it would be the same in



N O T E S (24)

an action against two upon the case for conspiracy; but not in such actions where there be a charge of conspiracy, yet the gist of the action is upon another matter."

The inconsistency and uncertainty of the language employed in the above decisions bear striking testimony to the confusion of thought which prevailed in the minds of the judges. Still, the main ideas intended to be conveyed are clear enough in their broad outlines.



# NOTES

104-11 (p. 30) It will be seen from the fact that Lord Hale is speaking of actions upon the case, not of actions of conspiracy. Though the foundation of the latter as well as of the former was really the damage done to the plaintiff by the false accusation, the conspiracy was nevertheless considered an integral part of the wrong to be redressed. See note 18, p. 22.





# NOTES

Note 33 (p. 30)      The remainder of this passage, in which Lord Holt further illustrates the two actions, is as follows: ...."unless the parties were indicted of a capital crime, (P.M.B. 110) in which action of conspiracy properly so-called, if it be brought against two, and the one found guilty, and the other acquitted, no judgment can be given against him who is found guilty.....And no villainous judgment shall be given, but where a conspiracy was to take away a man's life; and conspiracy, though nothing be done thereupon, is a crime and punishable at the suit of the King. But where the conspiracy is only to indict a man for a misdemeanor, though the action be against two, and only one is found guilty, yet judgment shall be against him, as in the case of trespass; for really it is an action on the case, and no action of conspiracy." (5 Mod. 394, 400).



Note 17 (p. 1) Clearer and more general statements that the elements of the tort of malicious prosecution are malice, damage, and damages: Jones vs. Gwynn, 10 Mod. 214 (1713); Chapman vs. Pickersill, 3 Wils. 143 (1703), Goslin vs. Willcock, 3 Wils., 203 (1705); Parcell vs. T. T. T., 1 East 311 (1803)

Malice as absence of legal justification: Jones vs. Gwynn (supra); Sutton vs. Johnstone, 1 T.R. 492 (1735).

Analysis of the conception of "probable cause", etc.: Mariel vs. Tracy, 6 Mod. 159 (1704); Jones vs. Gwynn (supra); Farmer vs. Darling, 4 Burr. 1371 (1766); Parcell vs. T. T. T. (supra).

Anything may be employed as an instrument of malice: Chapman vs. Pickersill (supra); Chambers vs. Robinson, 1 Wils. 251 (1725)



Note 1 (p.38) The original prosecutions for conspiracy reported in the Year Books are: 23 Lib. Ass., f. 77; 24 Ed. 3, 75; 26 Lib. Ass. f. 131 (pl. 43); 27 Lib. Ass. 13, 73, 74, 79, 138 (ch. 44); 28 Lib. Ass. 12; 30 Lib. Ass. 21; 9 Henry IV, f. 9.

The narrow scope of the offense of conspiracy during this period is shown in 24 Ed. 3, f. 73 (1351). Here was a presentment for conspiracy to imprison a man until he should pay a fine. Upon a petition to the Court of King's Bench to reverse the judgment, the court said: "And because neither year, nor day, nor place is averred,.....and moreover because the principal matter of the conspiracy alleged is not conspiracy, but rather damage and oppression of the people. Wherefore we reverse and annul the judgment."

In 40 Edward III, f. 19, Thorpe, J., admitted that where the conspiracy had been entered into in one county and executed in another, the King could not maintain an indictment in the first county, although a private plaintiff could pursue his remedy by writ of conspiracy in that county. The reason, he says, is "that the suit of the party in such a case is broader than the suit of the King."



## NOTES (1)

The only other criminal proceedings against conspirators of which we have any account until the time of King Charles II are a few cases in the Court of Star Chamber during the reigns of Elizabeth, James I, and Charles I. See note 3, p. 137.

The first of the modern prosecutions for conspiracy seems to be Rex vs. Timberley and Chille, 1 Wils. 12, 1 Lev. 12, (13-14 Car. 2 - A.D. 1662.)





## N O T E S

Note 2 (p. 30)      In the Book of Assizes, 17 Ed. 3, cap. 34, E. 126, we find the following (Art. 1): "Item of those who retain people with their liveries or fees to suppress the truth, and to maintain their evil enterprizes, etc. .... And hold, that two were indicted of confederacy, each of them to maintain the other, whether their latter were true or false, and notwithstanding that nothing was supposed as put in action, the parties were put to answer, because this being a forbidden in the law, etc." This article, as its language indicates, was founded upon the Definition of Conspirators. The offense described in the act represents a natural, though unnecessary, extension of the terms of the Definition.

The subsequent history of this law offense of confederacy, as distinguished from conspiracy, is an interesting illustration of the methods of legal development. A difference between the two offenses was recognized in a number of later cases: 17 Lit. Ass. ch. 44, lit. 6 (apparently based upon Item 5, supra.); 19 Lit. Ass. ch. 12; 29 Lit. Ass. ch. 105, lit. 2. See also the language of the commission of oper et terminer ("le comitis coadunationibus, confederationibus et falsis allegantiis.")

In the Poulterers' Case, the court once or twice uses "conspiracy" and "confederacy" synonymously. But a careful reading of the whole opinion reveals that the court is sensible of the difference between "conspiracy" and the offense then in-



More than, and inclined to call the later confederacy. This is the term employed by Lord Holt in his note.

Twiss, J., in Reg. vs. Twiss, 1 Feb. 1711 (1712) carefully distinguished the offenses, and says that Twiss and his companions were guilty of confederacy "as in the Fourth of Page." Twiss, J., however, says: "The false alliance or binding by oath is but a farther degree of conspiracy, which is all one and synonymous with confederacy, and of which the assembly and consultation is a sufficient fact." But in Reg. vs. Best, 1 Mod. 185 (1704), Lord Holt recognizes the distinction in these words: "This indeed is not an indictment for a formed conspiracy, strictly speaking, which requires an infamous judgment, and loss of liberam legem, as upon conviction on an attain, and for which an indictment will not lie until acquittal or an ignoramus found. But this seems to be a conspiracy late loquendo, or a confederacy to charge one falsely, which sure without more is a crime", etc.

The above facts possess a deep significance. They indicate that "conspiracy" had a special meaning of its own. Hence, when other combinations than agreements falsely and unlawfully to indict of felony were brought to the attention of the courts, they were punished under the name of "confederacy." Thus it appears that this new offense bore practically the same relation to the criminal law of conspiracy which the action upon the case



here is the civil law. Under cover of "confederacy" the courts were able to develop new principles relating to unlawful combinations; the most notable being that the mere act of combination is criminal, which is at the very foundation of the modern law upon the subject.

As long as the dominance of the civil action of conspiracy served to keep alive the technical meaning of "conspiracy", the latter offense remained distinct from confederacy. With the decadence of the old civil proceeding before the newer "action upon the case", however, the term "conspiracy" gradually lost its former narrow signification. The dividing line between it and confederacy became confused, and the two terms were often used synonymously (as in the Poultneys' Case and Starling's Case). By means of this interchangeability of the words, "conspiracy" was enabled to appropriate the conceptions proper to "confederacy". Finally the latter, having vastly enriched the law of illegal combination by the infusion of the principles worked out under the protection of its name, lost its separate existence; and the crime of "conspiracy" was made to include all criminal agreements whatsoever.



# NOTES

Note 3(p. 37 ) The first of these Star Chamber decisions was Gloucester vs. Hurlstone, Gouldsb. 51(pl. 14)- 1587, in which "it was over-ruled by the lordes, that if a jury at the common law..... give their verdict, although they make a false oath, yet they shall not be impeached by a bill in the Star Chamber: But if any collateral corruption be alleged in them, as that they took money or bribes, a bill shall lye thereof well enough."

In Amerideth's Case, Moore 562 (1600), certain tenants had combined and made joint obligations to contribute to maintain suits against their lord to compel him to grant copyhold estates to the heirs of the holder. "They were fined for the combination, and the maintenances, and the taking of the obligations one from the other." And in Lord Grey's Case, Moore 788, pl. 1078 (1607) certain tenants had joined in a petition to the King to obtain the benefit of a similar custom of the manor in respect to copyhold estates, and had agreed to share the expense ratably among them, and had signed a blank paper, giving authority to one Perkins to fill in what petition he pleased. The Star Chamber held this agreement illegal. "And Popham said that an illegal combination is not justifiable although the complaint is.... For the blank they





### N O T E (3)

seem all to be censurable, because it is an illegal combination, although the complaint is not censurable, because made to the King who has power to redress it; and the complaint is not made with terror, nor for a thing apparently illegal." In these two cases we seem to find the germ of the later doctrine that a conspiracy renders unlawful that which it is perfectly legal for one person to do.

Scroggs vs. Peck and Grey, Moore 568, pl. 765 (1600) was grounded upon an agreement to file a false bill in chancery against a third person. The scheme was abandoned, but notwithstanding this they were fined for the matter of agreement in prejudice of a third person without his privity.

Miller vs. Reynolds and Basset, Godb. 205, and Floyd vs. Barker, 12 Co. 23 (1608) are not important for our present purpose. The next case in point of time is the Poulterers' Case. It was followed by Ashley's Case, 12 Co. 90, in the following year. The last Star Chamber decision upon conspiracy was Tailor and Towlin's Case, Godb. 444 (1628), in which the court entertained a bill of conspiracy for a false indictment before a tribunal whose jurisdiction was not distinctly alleged, "because the conspiracy was the principal thing tryable and examinable in this court, and that was well laid in the bill."



# NOTES

Note 4 (p.40) To his report of the Poulterers' Case Lord Coke appends the following comment: "Nota, reader, these confederacies, punishable by law before they are executed, ought to have four incidents: It ought to be declared by some manner of prosecution, as in this case it was, either by making of bonds or promises one to the other; 2 ... malicious, as for unjust revenge, etc.; 3 .... false against an innocent; 4 .... out of court, voluntarily."



## N O T E S

Note 5 (p. 10) Bagg had been removed from his office of chief Burgess of the Borough of Plymouth. He complained that he had been unjustly treated. The Court of King's Bench said: .... "So if he intends, or endeavors of himself, or conspires with others, to do a thing against the duty or trust of his freedom, and to the prejudice of the public good of the city or borough, but he doth not execute it, it is a good cause to punish him, as is aforesaid, but not to disfranchise him"... (11 Co. 93 b. 9d) This passage strikingly shows the assimilation by the court of conspiracy to intent and attempt.

That the criminality of treason lies in the intent of the parties was first stated in Blunt's Case, 1 How. St. Tr. 1410, (43 El.-A.D. 1600). The Solicitor-General argued that "the compassing the Queen's destruction, which by judgement of law was concluded and implied in that consultation, was treason in the very thought and cogitation, so as that thought be proved by an overt act" ... The Lord Chief Justice said that the act of one treasonable conspirator, "though different in the manner, is the act of all of them who conspire by reason of the general malice of the intent."

These cases contain the elements out of which the general doctrine that a bare conspiracy to do acts prejudicial to the



## NOTES (5)

public welfare is criminal can be readily extracted.

Other combinations the criminality of which can be accounted for by this principle are: To raise the price of merchandise-Anon., 12 Mod. 248, (10 W. 3-1698.) Rex vs. Morris, 2 Ld. Ken.300, (1758.)

To raise wages-Journeymen Tailors' Case, 3 Mod. 11, (1721), etc. See Chapter 5.

To procure a marriage between paupers for the purpose of charging another parish with their support-Rex vs. Watson et al 1 Wils. 41, (1743), Rex vs. Herbert et al, 2 Ld. Ken. 466(1759), Rex vs. Fowler et al, East P. C. 466, (1788.), Rex vs. Tanner et al, 1 Esp. 304(1795.)

To prevent the burial of a corpse-Young's Case(Cited in Rex vs. Lynn) 2 T.R. 733(1788)

To solicit a witness to disobey a summons-Rex vs. Steventon et al, 2 East.362(1802).

To defraud the King by false vouchers-Rex vs. Brissac and Scott, 4 East 156, (1803).

To induce a female ward in chancery to marry a man in low circumstances (such acts constituting an interference with the jurisdiction of the Court of Chancery)-Rex vs. Locker et al, 5 Esp. 107(1804); Ball vs. Coutts, 1 Ves.and B 292, 304, (1812); Wade vs. Broughton, 3 Ves.and B. 172(1814)-said to be "a species of robbery."





DOCTRINE (II)

To stifle a prosecution-Claridge vs. Howe, 14 Ves. 19 (1807)

To obtain money as consideration for the corrupt procurement of an appointment as Coast Wailer, Rea vs. Pollock et al., 11 Q.B. 229 (1809).

To issue a false certificate to be used as evidence in a criminal proceeding - Rea vs. Hawkey et al., 6 T.R. 219, (1806).

To raise the price of government securities by circulating false rumors - Rea vs. De Beringer et al., 3 M. & S. 24 (1814)- said to be "a fraud levelled against all the public"....



# NOTES

Note 3, (p. 11) This principle was first laid down in Rex vs. Timberly and Childe, 1 Sid. 88 (13-14 Car. 2-A.D. 1632), wherein there had been an indictment for conspiracy to charge a person with being the father of a bastard child, with intent to extort money. The court upheld the indictment saying that "this court has consueance of every illegal thing for which damages may come to the party as here they say, for he will be for this liable for the maintenance of the child."

The facts in Green vs. Turnor et ux., 3 Keb. 399 (25 Car. 2-A.D. 1674) were similar. Twisden, J., thought that the court (K.B.) had no "consueance" of the offense charged upon the prosecutor, which was merely spiritual. "Contra by Wild and Rainsford, the information being for the conspiracy to draw sums of money from the plaintiff, not for getting the Bastard." Judgement, however, was stayed after conviction. But in Rex vs. Armstrong et al., 2 Vent. 305, (1677), a similar conspiracy was held indictable. The court said that it was "a contrivance to defame the person and cheat him of his money, which was a crime of a very heinous nature."

In Reg. vs. Daniell, 4 Mod. 100, (2 Anne-A.D. 1707.), and Reg. vs. Rest, 4 Mod. 137, 138, (38: Anne-A.D. 1704-5), Lord Holt laid it down generally that a conspiracy to charge a person with a merely spiritual offense is indictable in the temporal courts. He did not look beyond the charge to the purpose for which it was preferred, although the indictment alleged that it



# NOTES (d)

was a scheme to extort money.

In Rex vs. Kingersley and Moore, 1 Stra.193(4 Geo.1-A.D. 1719) the defendants were convicted of a conspiracy to charge Lord Sunderland with an attempt to commit sodomy, in order to extort money.

Atty. Gen. vs. Blood et al; T. Raym. 417(32 Car.2-A.D. 1680), arose out of a conspiracy to indict the Duke of Buckingham for buggery. Conviction. Rex vs. Veal et al., 2 Keb. 59, (13 Car. 2-A.D. 1666) was a case of conspiracy to charge with carnal knowledge. In neither of these was the purpose to extort money mentioned.

In Rex vs. Rissal et al, 1 W. Bl.368,(1760), however, Lord Mansfield described the offense as "the getting money out of a man, by conspiring to charge him with a false fact." Or, as reported in 3 Burr. 1320, "The gist of the offense is the unlawful conspiring to injure the man by this false charge." (p. 1321).



NOTES

Note 7, (p. 32) In Anon., 1 Lev. 23 (73-14 Car. 2, (A.D. 1662), the court advised the plaintiff in a suit to reverse a judgement on account of fraud to prefer "an information against the cheat, and also against the vintner in which the house was, in this court"... Were the element of combination does not enter.

Rex vs. Thode, 2 Keb. 111, 1 Vent. 234 (1675), was a conspiracy to cheat by the use of false dice. The court (Wild, J.) said, however, that "the conspiracy is laid only by way of aggravation."

In Rex vs. Armstrong et al., 1 Vent. 305 (1677), said that here was "a contrivance to defame the person and cheat him of his money, which was a crime of a very heinous nature."

In Rex vs. Orbell, 3 Mod. 42 (1703), the indictment charged that the defendant fraudulently, and per conspiracyem, to cheat J. S. of his money, got him to lay a certain sum of money upon a foot-race and prevailed with the party to "run booty. The court refused to quash it upon motion," for they said that being a cheat, though it was private in the particular, yet it was public in its consequences."

In Rex. vs. Macarty et al., 1 Mod. 302, (1704), and Rex vs. Parry et al., 2 Ld. Raym. 865, (1704), the cheats were looked upon as the gist of the offenses. In both cases, several persons were charged. But they were in terms convicted of the cheats. No mention is made of the element of combination at all in the





N O T E S (7)

opinion of the court. The indictment in the Macarty Case charged a "combination to cheat", but in the Parry Case there was no reference at all to the plurality of defendants.

After Rex vs. Wheatley, however, the element of combination was essential. See Rex vs. Huxey et al., 1 Leach Cr. L. 12(1782); Rex vs. Pywell et al., 1 Starkie 402, (1816). The holding in Rex vs. Wheatley was in effect, though not avowedly, anticipated in Rex vs. Marthan Bwan, 2 Stra. 866(1789).



## NOTES

Note 8(p.11) In addition to the cases cited in the text, the following may be noted: Rex vs. Thorp et al., 5 Mod.221(1733-A.D. 1896), a conspiracy to entice a young man under 18 years of age to marry a woman of ill fame, contrary to his father's wishes.

Rex. vs. Tracy, 6 Mod. 167,170, (1704), to arrest the plaintiff and illegally to hold him without bail.

McDaniell's Case, 1 Leach Cr. L. 444(1759), and Rex vs. Spragg, 2 Burr.993(1760) were conspiracies to indict innocent persons of crimes. These would have been conspiracies at any period from the time of Edward I.

In Reg. vs. Turnor, 13 last, 226(1810), Lord Ellenborough decided that a combination to commit a civil trespass was not an indictable conspiracy. This decision, however, was not followed in the later cases. See Chapter 5.

It should be observed that in all of these cases(with the possible exception of Clifford vs. Brandon) there are elements of illegality present in addition to the mere damage or oppression suffered by the complainant. Thus, as to Rex. vs. Thorp, we may point out that the procurement of such marriages was looked upon as unlawful independent of the element of conspiracy. (Reg. vs. Blissett and Holman, 2 Mod. 7(1800). In Reg. vs. Cro.Cay, 557(1839). Moreover, the attorney for the prosecution argued that the conspiracy was mentioned only as matter of



## NOTES (8)

aggravation. In any event, no judgment was given in that case. In Reg. vs. Cope, Reg. vs. Tracy, McDaniell's Case and Reg. vs. Spragg, the acts done would have amounted to civil wrongs if performed by single individuals. In Elizabeth Robinson's Case there was a scheme to defraud. Of Rex vs. Eccles, Ltd. Ellenborough said, in Rex vs. Turnor, that it "was considered as a conspiracy to do an unlawful act affecting the public." The statement in Clifford vs. Brandon is obiter dictum; and it appears that in the case cited in the note thereto the element of combination was treated as matter of aggravation.

Thus it appears that the above cases present no exception to the principle soon to be announced that a conspiracy always contemplates the accomplishment of an unlawful purpose or the use of unlawful means.



## NOTES

Note 9 (p. 37)      There are a number of these cases in the books. In some, acts of this character were considered as criminal although performed by a single individual. See Rex vs. Watson et al., 1 Wils. 41 (1713) - Several defendants, but no conspiracy; Amoy., Sayer StC (1780); Rex vs. Terrant, 1 Burr. 2106 (1767). In others, the element of conspiracy is present: See Rex vs. Edwards; Rex vs. Herbert et al., 2 Lord Kenyon 418 (1789); Rex vs. Compton et al.; Rex vs. Tanner et al., 1 Begg. 304 (1798) - acquittal because prosecution failed to prove its case.

In Rex vs. Fowler et al., East P.C. 461 (1760), the indictment was held not to lie; but this was because the purpose wrongfully to charge another parish had not been properly alleged.

Finally, in Rex vs. Howard, 3 M. and W. 137 (1834), it was held that such combinations were not conspiracies, because the purpose of charging another parish with the maintenance of a pauper is not illegal.





# N O T E S

Note 10 (p.59)            Cases in which several persons joined in the wrong doing, but the element of combination was disregarded: Rex vs. FAYNE et al., 1 Lord Raym. 348 (2 Anne - 1703); Rex vs. Warron et al., 1 Wilson 41 (1745).

Cases in which the conspiracy is mentioned, but apparently considered as a secondary element in the offense charged: Rex vs. Thode, 1 Feb. 111 (34 Car. 2 - A.D. 1672); Rex vs. Farquhar et al., 3 Feb. 799 (1677); Rex vs. Lord Grey, 1 East P.C. 480 (1683); Rex vs. Thore, 3 Mod. 321 (1694); Rex vs. Grimes and Thompson, 3 Mod. 210 (1696); Rex vs. Angiell, 4 Mod. 124 (1703); Rex vs. Orbell, 3 Mod. 42 (1703); Rex vs. Knyvess, 3 Mod. 320 (1725); Rex vs. Wheatley, 1 W. Bl. 273 (1760); Rex vs. Fiechl, 1 W. Bl. 363 (1760); Rex vs. Bellval, 1 W. Bl. 410, 440 (1762); Rex vs. Hevey, 1 Leach Cr. L. 232 (1782).

In the following cases, the conspiracy seems to be the gist of the offense: Rex vs. Best et al., 2 Mod. 127 (1706); Rex vs. Cole, 1 Stra. 144 (1719); Rex vs. Kinnarsley and Leare, 1 Stra. 105 (1819); Rex vs. Journeyman Tailors, 3 Mod. 11 (1761); Elizabeth Robinson's Case, 1 Leach Cr. L. 48 (1746); Rex vs. Parsons, 1 W. Bl. 392 (1762); Rex vs. Compton, Cald. 246 (1761).



# NOTES

Note 11 (p. 22) In Reg. vs. Thorne, 1 Mod. 311 (1698) counsel for the King stated that "that which is lawful for one man to do, may be made unlawful to be done by conspiracy", citing Reg. vs. Starling. This case was approved and applied in Reg. vs. Journeyman Tailors, 1 Mod. 31 (1701). The court said:..... "A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for one, or any of them to do if they had not conspired to do it, as appears in the case of Tubwenen vs. the brewers of London." The latter case is supposed to be the popular case of Reg. vs. Starling.

In Reg. vs. Arthur Bryson, 1 Str. 989 (1729), the court says obiter, in regard to Reg. vs. Best: "There the conspiracy was the crime, and an indictment will lie for that, though it be to do a lawful act." The same principle is expressed, again obiter by Lord Mansfield in Reg. vs. Meales, 1 Leach Cr. J. 274 (1763), and by Cross, J., in Reg. vs. Maib, 1 Q.B. 310 (1908). Although no authority is cited, both Lord Mansfield and Cross, J. evidently have in mind Reg. vs. Journeyman Tailors.

At the present time, a combination to accomplish a legal purpose by legal means is not a criminal conspiracy. Even today, however, a combination may be criminal although the acts contemplated would be merely unlawful, not indictable, if per-



N O T E S (11)

formed by a single individual. And the same is true of a com-  
position of single letters as part of an ordered system.  
The first, sec. 3.









N O T E S

C H A P T E R I V

Note 1(p. 59) In Rex vs. Thomas et al., 1 C. and P. 172 (1824), persons accused of a conspiracy to procure false witnesses in a certain action of ejectment were acquitted because the description of the court so imposed upon was uncertain, and also because there was a variance between the action mentioned in the indictment and that shown in the proof.

In Reg. vs. Riens, 1 A. and E. 327 (1834), an indictment for conspiracy to charge the prosecutors with an offense under a certain Act of Parliament was held to be vitiated by a misrecital of the Act.

See also Reg. vs. Steel, Car and M. 337 (1841), a case of variance between the indictment and the evidence.



# N O T E S

Note 2(p. 4) In Rex vs. Jones et al., 4 R. and A. 348 (1839), judgement was arrested upon a conviction of conspiracy to embezzle the estate of Jones, a bankrupt, in order to cheat his creditors, because the indictment did not indicate beyond a doubt that Jones was legally a bankrupt. Denman, C.J. said (p. 349): "Here the indictment charges a conspiracy to remove and conceal the goods of Jones: but if the commission was bad, Jones had a right to remove them. If we were to hold such an indictment good, it would follow as a consequence, that a party who was entitled to recover goods in an action, if taken from him, might be declared a felon for removing the very same goods. There is nothing stated on the face of this indictment to constitute an offense." In Pex vs. Peck, 9 A. and E. 325 (1839), he said: "Now obtaining goods without paying is, as Mr. Murphy argued, not necessarily a fraud: the words might apply to the obtaining goods to sell on commission."

See also Pex vs. Richardson et al., 1 Moo. and R. 402. Rex vs. Seward et al., 3 M. and M. 567 (1834): "When the charge is that it was intended to do the act by unlawful means, it must appear how those means are unlawful." (p. 561).



### NOTES

Note 3 (p.7)      The Act of 3 and 4 Victoria, cap.36(1849) creates a more definite relation between the criminality of the conspiracy and that of the act done by providing that no justice of the peace or recorder of any borough shall at any session of the peace or at any adjournment thereof try any person or persons for certain offences; among them(Sec.16), "Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offense which said justices or recorder respectively have or has jurisdiction to try when committed by one person."



### NOTES

Note 4(p. ) It is noteworthy that until 1834 there had been only one important case in which the court held that the combination before it was not indictable as a conspiracy. The only other case was Rex vs. Salter, 2 Sash. 443 (1834). This was an indictment "for that( the defendant) being an evil man, etc., and conspiring to aggrrieve one Land, pretended that he had broke his arm, and accordingly counterfeited the same, and upon that pretence refused to seek his living by any labor, and exhibited a complaint against him to the justices of the peace, etc." The indictment was quashed upon motion "as a matter not indictable." This case, however, is anomalous and possesses little significance.

But in Rex vs. Turner et al., 13 East 225(1810), Lord Ellenborough arrested judgement upon a conviction of conspiracy to trespass upon a game preserve and snare, kill and destroy the hares therein. He said(p.231):"But I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther: I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offense which would subject them to infamous punishment." He seems to recognize the principle making punishable combinations to achieve their objects "by some falsity"(p.230).





NOTES (4)

This case was expressly over-ruled by Hale, J., in Reg. vs. Rowlands, 2 Den.C.C. 384, 385(1251), upon the ground that the object which the conspirators had in view was also indictable, as well as actionable. But later cases have firmly established the principle that a combination to commit a tort is criminal. (See Page     )



## NOTES

Note 2 (p. 71) Conspiracies of this character reported during the 19th century were:

To pervert the course of justice by procuring false witnesses, Rex vs. Thomas et al., 1 C. and P. 47 (1804); Bushell vs. Barrett, Ry. and M. 434 (1826).

To secure a passport in the name of one person for use by another, Rex vs. Frailsford et al., (1901) 1 K. B. 730.

In addition, we may include combinations to defraud the public in various ways (See Note 3, p. ), and certain combinations among workmen (See Chapter 5).



# NOTES

Note 6 (p. 7) See Rex vs. Seward et al., 3 M. and M. 567 (1834)-  
by Ld. Denman; Rex vs. Vincent, 9 C. and P. 91 (1839); O'Connell  
vs. Reg., 11 Cl. and F. 185, 233 (1844); Reg. vs. Carlisle and  
Brown, 1 Dears. C.C. 337 (1854); Reg. vs. Brown et al. 7 Cox.  
C.C. 442 (1858); Reg. vs. Howell et al., 4 F. and F., 160 (1864);  
Mulcahy vs. Reg., 1st Rep. 1 Com. Law, 13, 31 (1866-7); Reg.  
vs. Bunn, 12 Cox C.C. 316 (1872); Reg. vs. Aspinall, 2 F. & D.  
48 (1876); Reg. vs. Orman and Barber, 14 Cox C.C. 381 (1880);  
Reg. vs. Parnell et al., 14 Cox C.C. 508 (1881); Ex Parte  
Dalton, 28 L.R. Ir. 36 (1890); Quinn vs. Leason, 10 L.J.R. 10  
(1901); Rex vs. Brailsford, (1905) 2 K.B. 730.



## N O T E S

Note 7(p. ) The following are cases in which the objects of the combinations were themselves indictable offenses.

To cheat the King by false vouchers, Rex vs. Briggs et al., 4 East 166(1403).

To hold an unlawful, seditious and disorderly meeting-  
Rex vs. Hunt et al., 3 B.and A. 566(1820).

To obtain enhanced wages, in violation of St.39 and 40 Geo.3,C, Rex vs. Ridgeway, 5 B.and A.527(1822).

To carry away a young lady under sixteen years of age from the custody of her parents and guardians, and marry her to one of the conspirators, contrary to St. 3 Hen.7, ch.2,  
Rex vs. Wakefield, 2 Lew. 1(1827).

To poison a man, Mandell's Case, 2 Lew.51(1830).

To conceal and embezzle the goods of a bankrupt and so to cheat his creditors, Rex vs. Jones et al., 4 B.and A.345 (1832).

To raise an insurrection and obstruct the laws, Reg. vs. Shellard, 9 C.andP.277(1840).

To hold an unlawful assembly and create disaffection. Rex vs. Vincent et al., 9 C.and P.91(1839).

To cheat and defraud by false pretences, Reg. vs. Parker et al., 3 Ad. and E.W.3.741(1842).

To cheat of money by false pretences, Reg. vs. Kenrick, D.and M.303(1843).





## NOTES (7)

To create disaffection, hatred and sedition, etc.,  
O'Connell et al. vs. Reg., 11 Cl. and F.155(1844).

To forge a post-office money order, and thus to defraud  
the queen and others, Reg. vs. Brittain and Snickell, 3 Cox C.C.  
76(1848).

To use a dyer's materials wrongfully to dye goods for  
other persons (under circumstances such as to make the  
conspirators liable for larceny or embezzlement of the  
materials). Reg. vs. Button et al., 3 Cox C.C.229(1848).

To violate Act 6 Geo 4, C.129 (See Chapter 5), Reg. vs.  
Duffield et al., 5 Cox C.C.404(1851); Reg. vs. Rowlands et al.,  
3 Cox C.C.136(1851).

To commit murder, Reg. vs. Ahearne, 6 Cox C.C. 6(1858);  
Reg. vs. Bernard, 1 F. and F. 240(1858).

To destroy a ship with intent to prejudice the underwriters  
( a felony by Stat. 54-5 Vict., C.79); Reg. vs. ... , 4 F. and F  
68(1864).

To defraud a benefit society of its funds, Reg. vs.  
Knowlden et al., 9 Cox C.C. 44(1864).

To liberate from jail a prisoner charged with treason-  
felony, Reg. vs. Desmond et al., 11 Cox C.C.146(1863).

To commit larceny, Reg. vs. Taylor and Smith, 22 L.T.M.S.  
75(1871).

To kill an infant after it should be born, Reg. vs.  
Banks, 12 Cox C.C.393(1873).



## NOTES (7)

To commit abortion, Reg. vs. Whitechurch, 24 B.L.R. 450 (1890).

To defraud by false pretence, Reg. vs. Plevin, 71 L.J.M.S. 305 (1902).

To take a child out of the custody of its guardians (a felony by St. 24 and 25 Vict. C.100, sec.56). Reg. vs. Duguid 75 L.J.R.B. 470 (1906).

Within this class of conspiracies should be included combinations among workmen to do acts forbidden by statute. See Chapter 5.



NOTES

Note 3(p. 87) In the following cases, the acts contemplated by the conspirators would have amounted to legal injuries if performed by single individuals.

To poison cattle with arsenic, Rex vs. King et al., 2 Chitty 217(1820).

To extort money by a false charge of forgery and felony, Rex vs. Ford and Aldridge, 1 N. and M. 776(1833).

To extort goods by a threat to imprison, Bloomfield vs. Blake et al., 6 C. and P. 75(1833).

To charge a person with a crime, Rex vs. Eiers, 1 A. and E. 327(1834).

To extort money by a threat to charge with a crime, Rex vs. Yates et al., 6 Cox C.C. 441(1853).

To impoverish Irish landlords by inducing and compelling tenants not to pay rent, Rex vs. Parnell et al., 14 Cox C.C. 508(1881); Ex Parte Dalton, 28 L.R. 1r. 36(1890).

The principle that a conspiracy to commit a legal injury is indictable was stated generally in Rex vs. Parnell (supra), Kearney vs. Lloyd, 22 L.R. 1r. 202, Trim v. L. 20 L.R. C. 22(1901).



## N O T E S

Note 9(p. )      The following combinations may be embraced within the general category of conspiracies to cheat and defraud:

To obtain goods on credit with intent to defraud the merchant of the price, Rex vs. Roberts et al., 1 Camob.399(1806).

To cheat and defraud by selling an unsound horse, Rex vs. Pywell et al., 1 Starkie 402(1818).

To defraud of goods, Anon.(1819), 1 Clift. 292.

To defraud by misrepresenting value of certain lands and properties and thus inducing the prosecutor to loan large sums of money, Rex vs. Whitehead, 1 Car.and P. 67(1824).

To cheat and defraud( but indictment said to be "too general"), Rex vs. Fowle and Elliott, 1 C.and P.590(1831).

To buy goods with intent not to pay for them, etc., Reg. vs. Peck, 9 A.and E. 686(1839).

To defraud of goods by false pretence that the defendant was a certain merchant named Grantham, Reg. vs. Steel, Car. and M. 337(1841).

To cheat and defraud of the fruits of a verdict(but charge said to be "too general"), Rex vs. Richardson et al., 1 Moo. and R.402(1841).

To defraud the Queen by procuring the illegal entry of dutiable imports without payment of the duty, Reg. vs. Blake and Tye, 6 Q.B. 126(1844).

To cheat and defraud by false pretences in a sale of two horses and a mare, Reg. vs. Ward, 1 Cox C.C. (1844).





N O T E S (9)

"To cheat and defraud of goods and chattels," Siddons vs. Reg., 11 Q.R. 245(1848).

To defraud of money by inducing a person by false pretences to accept certain bills of exchange, Reg. vs. Gompertz et al., 9 Q.R. 824(1846).

To cheat and defraud by securing goods on credit and selling them to one of the defendants upon execution after a collusive action, Reg. vs. King et al., 7 Q.R. 780(1848).

To cause foreign goods unlawfully to be removed from a bonded warehouse, with intent to defraud the Queen of duties payable thereon, Reg. vs. Thompson et al., 16 Q.R. 832(1851).

To obtain goods from tradesmen with intent not to pay for them, Reg. vs. Whitehouse et al., 6 Cox C.C. 39(1852); Reg. vs. Ryecroft et al., 5 Cox C.C. 76(1852).

To cheat and defraud of leasehold tenements and messuages, Reg. vs. Whitehouse et al., 6 Cox C.C. 129(1852).

To cheat and defraud by false representations as to the soundness of horses, Reg. vs. Carlisle and Brown, 1 Deares.C.C. 237(1854).

To defraud of money by exchanging cancelled notes for good money, Reg. vs. Bullock and Clark, Deares.C.C. 652(1855).

Among tradesmen to dispose of their goods in contemplation of bankruptcy, with intent to defraud creditors, Reg. vs. Wall et al., 1 F. and F. 33(1858).



N O T E (2)

To cheat and defraud by false representations as to the solvency or trade of another person, whereby the prosecutor was induced to enter into partnership with him and suffered loss, Reg. vs. Timothy et al., 1 T. and F. 39(1858).

Among directors of a corporation by false representations in a balance sheet to defraud shareholders and the public, Reg. vs. Brown et al., 7 Cox C.C. 442(1858).

To defraud a railway company by obtaining and selling non-transferable excursion tickets to other persons for use by them, Reg. vs. Absolon and Clarke, 1 T. and F. 423(1859).

To cheat by procuring a person to bet upon a proposition which had been "fixed" beforehand. (Guilt of offenders was not relieved by the fact that the prosecutor had intended in the same manner to cheat one of the defendants.) Reg. vs. Hudson et al., Bell C.C. 263(1860).

To defraud of money by false pretences, Latham et al. vs. Reg. 5 B. and S. 635(1864).

To defraud an insurance Company by sending in false lists of goods destroyed in a fire, Reg. vs. Barry et al., 4 T. and F. 389(1865).

To defraud shareholders in a corporation by publishing a false balance sheet, Reg. vs. Burch et al., 4 T. and F. 407 (1865).

To cheat the public by circulating a false prospectus leading to the sale of worthless shares of stock, Reg. vs. Gurney et al., 11 Cox C.C. 414(1869).



W O R D S (9)

Between a partner in a firm and a third person to defraud the other partner of the share of assets to which he was entitled upon a dissolution of the partnership, Reg. vs. Warburton, 11 Cox C.C. 584(1870).

To defraud certain booksellers by circulating forged testimonials respecting a certain book which they were thereby induced to buy, Reg. vs. Stenson et al., 12 Cox C.C. 111(1871).

To defraud by procuring by false pretences the listing of certain stock by the Stock Exchange, Reg. vs. Aspinall et al., 2 Q.B.D. 48(1876).

To defraud tradesmen of certain jewelry by obtaining it on credit without intention to pay for it, Reg. vs. Orman and Barber, 14 Cox C.C. 381(1880)

To sue for and collect a debt that had been already paid, Reg. vs. Taylor and Boynes, 15 Cox C.C. 265(1883).

To cheat and defraud, Reg. vs. Manning, 12 Q.B.D. 241 (1883).

To cheat the public by inducing persons to buy stock given a fictitious value by manipulation, Scott, vs. Brown, 61 L.J.Q.B. 733(1892).

To cheat and defraud of goods, Reg. vs. McKenna, 17 Cox C.C. 492(1892).

To cheat and defraud a Railway Co. by the abstraction and sale of return half-tickets, Reg. vs. Quinn et al., 19 Cox C.C. 78(1898).



N O T E S

Note 10(p. 74) Observe the difference between Rex vs. Mott and Rex vs. Stratton et al., (Note to Ruck vs. Ruck) 1 Camm. 549(1803), wherein the Defendants had been indicted for a conspiracy to deprive a man of his office as Secretary in an unincorporated company with transferable shares. Lord Ellenborough held that the indictment could not be maintained, saying: "This society was certainly illegal. Therefore to deprive an individual of an office in it, cannot be treated as an injury. When the prosecutor was secretary to the Company, instead of having an interest which the law would protect, he was guilty of a crime"... (Such companies had been forbidden by St. 6 Geo 1, c.13, and branded as common nuisances.)





Note 11(p. 11) The following cases should be noted in addition to those set out in the text.

To defraud by holding a mock auction and collusively bidding up inferior goods, Reg. vs. Lewis, 11 Cox C.C. 404(1834).

To prevent the collection of a church rate by collecting riotous assemblies before the broker's house and directing public hatred against him, Reg. vs. Murray et al., 2 Car. and P. 197(1837).

To disquiet a person in possession of leasehold estates by molesting the tenants, etc., Reg. vs. Cooke, 5 B. and C. 538(1826).

To defraud a legatee of money under a will by taking a false oath that a certain third person was the testator's grandson, Reg. vs. Dean et al., 4 Jur. 364(1840).

To defraud a widow of East India Stock by fraudulently obtaining letters of administration upon the estate of her husband, etc., Wright vs. Reg., 14 Q.B. 147(1849).

To extort money by threat to charge a person with a crime of which he was really guilty, Reg. vs. Hollingberry, 6 D. and P. 345(1825); Reg. vs. Yates et al., 2 Cox C.C. 441(1853); Reg. vs. Jacobs et al., 1 Cox C.C. 173(1845).



N O T E

Note 12(p. 77) A somewhat similar idea as to the limitation to which the law of conspiracy should be subjected was suggested as early as 1752, in the case of Cheewind vs. Lindon, 2 Ves. and Sr. 450. The defendant had demurred to such part of a bill in chancery as sought to compel her to discover a conspiracy or attempt to set up a child which she pretended to have had by a person who had lived with her and was desirous of having<sup>a</sup> a child by her, because such a disclosure might subject her to penal proceeding. Lord Hardwick said:..."The question is whether it is so charged, as, if confessed in the answer, would be a ground for a criminal prosecution in a court of law; for it is not every conspiracy will be a ground for a criminal prosecution. If that was the case, almost all the causes in this court would come within that description. The boundaries are often very nice, where a matter is near indictable and a fraud in this court. This setting up a private fraud does not impede the course of descent in law so as to defeat the heir at law; for if so, it might be a conspiracy indictable: but this is to the disservice of no one; and by this means several frauds in this court might be covered by demurrer." Demurrer over-ruled.



# NOTES

## CHAPTER V

Note 1 (p. 117)      As to the statement that "a conspiracy of any kind is illegal", etc., Wright says (p. 117): "This general proposition has no real necessity for its decision; it is not supported by its reference (Smith), and it appears to be a composition, which is contradicted by every evidence and subsequent authority, and consideration is not to be given, independently of its purposes. However, that the result is notwithstanding appears from the fact that the reporter, under the word, 'conspiracy' to a case at Cambridge town on the 7th of June, 1791, which did not arise in Cambridge, but only in the neighborhood." Wright on Conspiracy, p. 42.

In support of the International League Case, however, we may adduce the following considerations: (1) The proposition that what is illegal for one person is so for all is a general principle of public law. It would be no more than a general principle of public law. Several earlier cases had been cited in the original case, and the court had not been able to find any other. Again, the law of the country, decisions direct, in point (see note p. ) had never been overruled. However, Cleveland's case was still maintained, as shown by the statement that the court was of the opinion that the principle. That it was so interpreted is indicated by the language used in the statement of counsel in Int. L. Case, 2 Sup. Ct. Rep. 111, 112 (1884):



# NOTES (1)

"That which is to be done is to do, not for mere motives of  
to be done by some of our instances, it is better for the  
wages to be small than, that if several shall be together  
to draw no small but all strong power, he is to be deferred the  
King of the Jellies, such a difficulty is indicated. And so it  
was held in Barbier's Case, 118. Moreover, the  
providence given to the element of conspiracy in 1844,  
decided but a few years before (1800) doubtless had its effect  
likewise. So there is nothing impossible in the view taken by  
the court in the Journalists' Case if the attendant cir-  
cumstances be borne in mind.

(2) Rey vs. Starling, however, does mark the beginning  
of the principle that a combination to injure the public was  
unlawful criminal. And there can be little doubt that such  
a combination of workmen was regarded as highly prejudicial to  
the public welfare. This clearly appears in the language of the  
Act of George I, ch. 13, and in the industrial history of the  
period. The treatment likely to be accorded to a combination  
to raise rates, moreover, is significantly demonstrated by the  
cases holding illegal the endeavor by individuals and combina-  
tions artificially to raise the price of merchandise. See 27  
118. 118, ch. 14, 118 118; 27 118. 118, ch. 14, 118 118;  
3 118. 118; Barbier's Case, 118. 118; Rey vs. Starling,  
1 118. 118.

In view of these circumstances, there seems to be little  
room for doubt either as to the authenticity of the report of





the International Criminal Court, or as to the soundness of the extension of the jurisdiction in the standard of non-exhaustive jurisdiction.

We may note, also, that not only was this case accepted without criticism or comment at the time, but it was never placed in question even by the distinguished jurist, Sir R. Wright, himself attacked it. And it was cited with approval by Lord Goff in Pratt v. Attorney General, [1993] 1 A.C. 1 (1993).

The general criticism which may be passed upon Sir R. Wright's book is well expressed by Professor Dicey: "Wright's Law of Criminal Conspiracies - published before, but not republished after he was raised to the bench - contains elaborate arguments to show that this extension (i.e. of the law of conspiracy in general) was illegitimate, and was not really supported by the authorities on which it is supposed to rest. From a merely historical point of view these arguments have great force, but from a legal point of view their effect is diminished by the reflection that similar arguments if employed by a lawyer of as wide historical information and of as keen logical acumen as Sir R. S. Wright, would shake almost every accepted principle of English law, in so far as it does not depend upon statute." Law and Opinion in England, p. 100, note.



# NOTES

Note 2 (p. 41) Thus, the Act 7 George I, Statute 1, c. 13 (1710), recites that the combinations among the tailors to raise their wages, etc., were "of evil example and tendency (tend) to the prejudice of trade, to the encouragement of idleness, and to the great increase of the poor: For remedy thereof" it is enacted that such combinations etc., "shall be and are hereby declared to be illegal, null and void to all intents and purposes", etc.

Act 12 George I, C. 34, however, entitled "An Act to prevent unlawful combinations of workmen", etc., recites the formation of "unlawful clubs and societies", and their promising "contrary to law to enter into combinations", etc.; also, that such persons "do unlawfully assembling and associating themselves" have committed violence, etc.; and that "more effectual provision should be made against such unlawful combinations..... and for bringing all offenders in the premises to more speedy and exemplary justice."

This language, which is followed by the later statutes including the Acts 39 and 40 George III, clearly shows that the above combinations were regarded as illegal and not as unlawful.



## NOTES

Note 3 (p. 425) This principle involves a well known principle. The "Trade Disputes Act, 1906", provides (Sec. 2): "It shall be lawful for one or more persons acting in concert and either on behalf of a trade union or of its individual members or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." And Section 7 of the Act of 1906 is repealed from "attendance at or near" to the end of the section.

The latest case upon the subject of picketing is Ford, Lock and Co. v. Operative Printers' Assistants' Society (1909), 22 T.L.R. 327. Here the court held that a picket for the purpose of requesting workers to become members of the union was not an offence within the Act of 1906. It was said that the object of Sec. 7, sub - sec. 2, of the Act was to give a summary criminal remedy in respect to certain specified classes of acts for which there had previously been only a civil remedy. In other words, picketing was not criminal under the Act unless it was of such a character as to amount to a civil wrong or common law.



# NOTES

Note 4 (p.126) See Reg. vs. Burdett et al. (1840), 3 Q. and W. 401 (notes); Reg. vs. Bell, 21 Q. (1847), 3 Cox C.C. 406 (note); Reg. vs. Duffield et al. (1850), 3 Cox C.C. 406; Reg. vs. Rowlands (1851), 3 Cox C.C. 406; 2 Geo. C.C.C. 304; Reg. vs. Smith et al. (1857), 10 Cox C.C. 406; Unimproved Spinning Machine vs. Riley (1859), 2 L.J. & Co. 101 (this is the first case in which an injunction issued in a labor dispute); Reg. vs. Sheppard (1869), 11 Cox C.C. 307, Reg. vs. Roberts et al. (1875), 13 Cox C.C. 82; Judge vs. Bennett (1888), 72 J.P. 247, (held, that the character of the picket, as peaceful and non-violent, or not, must be determined with reference to the effect actually produced by it.); Smith vs. Thompson (1890), 15 L.J. 748 (a case of "persistent following" within the meaning of 1875.); Kennedy vs. Cowie (1891), 60 L.J.M.C. 170; Reg. vs. Kennedy (1892) 21 L.J.M.C. 121; Reg. vs. Edwards (1893), 61 J.P. 776; ExParte Wilkins et al. (1875), 64 L.J.M.C. 221; Smith vs. Neely (1903), 73 L.J.M.C. 13.





note 5 (1918). The first case arising out of a fraud scheme in which an injunction was issued seems to be Harrold v. Harrold, 10 L.J.K.B. 111 (1900), in which the court granted a first time injunction which was part of an order of summary judgment. We do not find any other case until 1892, when two injunctions were granted against the circulation of false and malicious circulars. (Collier v. Collier, 1 Ch. (1892) 271; Link v. Federation of Trade and Labor Unions, 27 C.T. 231.)

From this time on injunctions become more common. See Collier v. London Building Trades Federation, 22 C.T. 231 (1898); Lyon v. Wilson, 18 L.J.K.B. 261 (1900); Storob v. Court, (1899) 1 Ch. 26; Galters v. Green, 68 L.J.Ch. 73 (1900); Taff Vale Ry. Company v. Amalgamated Society of Railway Servants, 70 L.J.K.B. 25 (1901); Chamberlain's Case, 1 Ch. 205 (1900).

After the Taff Vale Case (supra) both damages and an injunction were sometimes awarded and granted. See Union v. Union, 70 L.J.K.B. 76 (1901); Gill v. National Amalgamated Laborers' Union of Great Britain and Ireland, (1903) 1 Ch. 205; South Wales Miners' Federation v. Glamorgan Coal Company, 74 L.J.K.B. 525 (1905).



note 9 (1948). It has been decided in Leitch v. Barber, 32 L.J.K.B. 434 (1943) that maliciously inducing a breach of contract was actionable. That case was approved in Union v. Leitch, 104 L.J.K.B. 194 (1942), and in Leitch v. Miners' Association vs. Glasgow Coal Company, 70 L.J.K.B. 434 (1943), in which it was also said that the absence of ill-will was no justification. The matter is dealt with in the "Trade Disputes Act, 1906" in these words (Sec. 3): "Any act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induced some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills".

The latter part of the section is intended to negative certain statements in Leitch v. Barber and other cases, especially the decision in Gillon v. National Amalgamated Laborers' Union of Great Britain and Ireland, (1905) 1 T.R. 100.

The Taff Vale Railway vs. Amalgamated Society of Railway Servants, 70 L.J.Q.B. 966 (1904), Gillon v. National Amalgamated Laborers' Union, etc. (supra), House v. Watered, Leitch v. Miners' Association vs. Glasgow Coal Company (supra), Leitch v. Miners' Association, supra, L.J.K.B. 434, and Leitch v. Barber and Leitch v. Miners' Association vs. Glasgow Coal Company, supra, L.J.K.B. 434 (1943) had established that a trade dispute was not a defense to an action for maliciously inducing a breach of contract.







## V I I A

The author was born in Cambridge, Massachusetts, Maryland, February the twenty second, 1880. His parents having removed to Baltimore when he was but ten years of age, his education has been pursued wholly in that city. He received his preliminary training in the public schools, and was prepared for college at the Baltimore City College and Marston's University School.

In the fall of 1900 he was matriculated in the Johns Hopkins University, from which he received his Bachelor's degree June the ninth, 1903. In October, 1903, he entered the Law School of the University of Maryland, and was graduated June the fifth, 1906, with the degree of Bachelor of Laws. On September the seventh, 1906, he was admitted by the Court of Appeals to the Bar of Maryland.

In the fall of 1904 he returned to the Johns Hopkins University for graduate studies in Political Science, History, and Political Economy. He has been engaged in this work continuously until the present time.



















